(2020) 01 DRAT CK 0010

In the Debts Recovery Appellate Tribunal

Case No : Miscellaneous Appeal No. 467 Of 2019

State Bank Of India APPELLANT

Vs

Harpreet Singh Banga RESPONDENT

Date of Decision : 01-01-2020

Acts Referred:

Securitisation And Reconstruction Of Financial Assets And Enforcement Of Security Interest Act, 2002 — Section 13(2), 13(4), 14, 17(1)

Citation : (2020) 01 DRAT CK 0010

Hon'ble Judges : P.K. Bhasin, J

Bench : Single Bench

Advocate : A.K. Singh, Sanjeev Bhandari

Final Decision : Allowed

Judgement

1. The respondent-borrower approached the Tribunal below (DRT) with a Securitization Application (S.A.) under Section 17(1) of SARFAESI Act after he had been dispossessed by the appellant Bank from his residential house which he had mortgaged in favour of the appellant Bank to secure the housing loan which had been sanctioned in his favour by this Bank sometime in the year 2013. The appellant Bank had taken possession of the mortgaged house of the respondent-borrower on 24.09.2019 exercising its powers under Section 13(4) of SARFAESI Act with the aid of police which had earlier in April, 2017 been allowed by the District Magistrate in exercise of its powers under Section 14 of SARFAESI Act.

2. The respondent-borrower had inter-alia claimed in his S.A. that the 'Account was not NPA' inasmuch as the respondent had made payments in advance for many years and so his account was regular and further that even though the respondent had given his reply to the demand notice under Section 13(2) of SARFAESI Act but the appellant Bank had not replied to the same. Another grievance raised was that even though the District Magistrate had while allowing Bank's application under Section 14 of SARFAESI Act and granting an order for police aid for taking over physical possession of the mortgaged property in

question vide order dated 21.04.2017 directed the Bank to give at least 48 hours' notice to the respondent-borrower but the Bank's authorized officer along with some unauthorized person had barged into the house of the appellant more than two years of the passing of the order by the District Magistrate under Section 14 of SARFESI Act on 24.09.2019 in the absence of the respondent and his family Shri N.S Sisodia, respondent no. 2, authorized officer of the bank and who was also the respondent's business partner and whose intentions had become bad and he himself became interested to buy the respondent's house worth a crore of rupees for half its price, turned out of house the maid who only was present and had sealed the house without getting the entire sealing work witnessed by two independent witnesses as was also the direction of the District Magistrate thereby committing blatant disobedience of the order of the District Magistrate.

3. The respondent-borrower had also moved a separate application in his S.A. for a direction to the appellant Bank to deliver back the possession of his house on 'superdari' during the pendency of the S.A. That application has been allowed vide impugned order which is now being challenged by the appellant Bank and the relevant parts therefrom are re-produced below:-

"I.A No. 1008/2019

2. By way of the present IA, the applicant has prayed to direct the bank to handover the possession of the property on superdari till the disposal of the SA, do not interfere in the possession of enjoyment of property during period of possession in terms of the court order.

3. Ld. Counsel for the applicant submitted that the respondent has taken forceful possession of the property bearing no. D-615, Jal Vayu Towers, Main Dadri Road, Near Jagran Public School, Sector-47, Noida, UP (in short "property in question") that too without serving any notice upon the applicant therefore, the action of the respondent bank for taking possession of the property in question may be quashed and the property may be restored back in favour of the applicant. He also submitted that the applicant was residing in the property in question along with his wife and two children, however, since the possession of property is taken by the bank, the applicant and his family is living with their relatives. He submitted that the marriage of the daughter of the applicant is fixed in December 2019 and all the material relation to her marriage is lying the property in question and the applicant has to make necessary arrangement for marriage and for which he needs the property therefore, he submitted that the respondent bank may be directed to handover the possession of the property in question to the applicant.

4. He also submitted that the Home Loan was granted by the bank in May 2013 for total sum of Rs. 65.42 lacs, which was to be repaid in monthly installments of Rs 62,247.50 over a period of 20 years, out of which the applicant has already paid more than Rs.35 lacs which was confirmed by the bank in its possession

notice dated 24.09.2019 wherein it is stated that the balance outstanding amount is Rs. 29,72,476.50 as on 24.09.2019. He also contended that the applicant has deposited the sufficient amount with the respondent bank after the demand notice under Section 13(2) of the SARFEASI Act, 2002 and as such installment till September, 2020 had already been paid, thus, he contended that the respondent bank may be directed to regularize the account and not to taken any further action under the SARFEASI Act, 2002. For the said purpose, he referred the RBI guidelines for up gradation of the account.

5. In support of the contentions, Ld. Counsel for the applicant has relied upon the judgment of Hon'ble Supreme Court in the matter of M/s Hindon Forge Pvt. Ltd. and Anr., Civil Appeal No. 10873/2018 and judgment of Hon'ble Madra High Court in the matter of Sri. Manicka Vinayagar Spinning Mills. Vs. State Bank of India & Ors., W.P No. 4048/2008.

6. Per contra, Ld. Counsel for the respondent bank objected on the present IA and submitted that applicant had taken almost 3 years' time but failed to pay the outstanding amount in loan account thus, the present IA is liable to be dismissed. She also submitted that respondent bank initiated proceeding for the possession of the property in question in the year June 2017 and the applicant also sent letter dated 05.07.2017 requesting the respondent not to take physical possession of the mortgaged property and mentioned in his letter to go ahead with possession proceeding, if he fails to make the payment. She also submitted that the bank has taken possession of the property after giving ample opportunities to the applicant thus, the present IA is liable to be dismissed.

7. Considered the submissions of both sides and perused the record.

8. Admittedly, after the NPA date i.e., 15.07.2016, the applicant has repaid an amount of Rs.33,22,772/- till March 2018, which according to the applicant amounts to payment of the EMIs due till September 2020 and these credits have been appropriated in the account impugned by the respondent bank. But after appropriation, instead of considering the account for up gradation, the respondent bank has taken the possession of the property in question on 24.09.2019 in furtherance of an order obtained more than 2 years prior, from the Ld. District Magistrate dated 21.04.2017. It is also important to note here that even after the order of Ld. DM dated 21.04.2017, the applicant has admittedly deposited around Rs. 27 lacs, however, instead of disclosing the said fact of recoveries bank in a rush, has forcibly taken the possession of the property in question, without complying the directives of notice to be given. It is worth highlighting here that in the order dated 21.04.2017, Ld. DM has directed to given notice of minimum 48 hours and maximum of 7 days to the borrower and the proof of the same shall be placed on record. However, the respondent bank in utter disregard of the direction of the Ld. DM, has taken the possession of the property without issuing any prior notice of 48 hours at all. The respondent bank in its reply has given an explanation in following manner:

"In reply to para 13, it is submitted that since the order from Ld. DM was obtained on 21.04.2017 wherein there is mention of 48 hours however, it is important to mention here that the appellant had been in constant touch with the bank and had day to day information about the possession proceedings as such question of re-informing the appellant does not arise at all...

9. Thus, the respondent bank instead of serving the notice of at least 48 hours as directed, has itself presumed that the applicant was in touched with the bank therefore, he was having the information of possession. The said action of the respondent bank is highly deplorable as the applicant has specifically stated that the applicant was never been informed regarding the possession of the property and the possession has been taken all of sudden.

10. It has been seen as a general practice of the public sector bank including the SBI, that in the home loan accounts, the bank themselves upgrade the account and provide an opportunity to the borrower to continue their account on initial repayment terms, after the deposit of the overdue amount. However, in the present matter, despite the depositing of amount which is more than the EMI to be deposited till date, the respondent bank in a hasty and clandestine manner took the possession of the property in question.

11. Considering the peculiar facts of the case that, firstly the applicant has paid the EMIs till September, 2020 and deposited Rs.33,22,772/- till March 2018, secondly the respondent bank in utter disregard of the direction of the Ld. DM, has taken the possession of the property without issuing any prior notice of 48 hours, and also since the marriage of the daughter of the applicant is fixed in December 2019, therefore, this is a fit case for restoration of the possession of the property in question to the applicant within 7 days from this order and also provide the details of the amount with relevant vouchers which is required to be deposited on account of expense incurred on Publications, Police Escorts, Valuation and legal expenses to the applicant herein, for deposit by him thereafter, within the next 15 days.

13. The applicant herein is also directed to deposit the regular EMI to the respondent bank."

3. This order has been impugned by the appellant Bank which is a secured creditor. Main ground of challenge to the impugned order pressed into service by Mr. A.K. Singh, learned counsel for the appellant bank was that when the S.A. of the respondent-defaulter is still pending adjudication before the DRT the learned Presiding Officer was no justified in passing the impugned interim direction to deliver back the possession if its secured asset to the defaulter borrower and that too without even ay observation that the security applicant has any prima facie case to establish or that balance of convenience in his favour for grant of the impugned direction which in fact grants to him the main relief claimed in the S.A. Even public interest has not been taken into consideration while passing the impugned order ignoring the fact that entire loan, even if was payable in

instalments spread over a period of twenty years, stood recalled and unless that decision of the bank is finally held to be violative of any legal provision no interim relief of the nature which has been granted By DRT could be legally granted. In support of this submission learned counsel relied upon a Division Bench judgment of Madras High Court in the case of "Sri Manicka Vinayagar Spinning Mills vs State Bank of India"(Writ Petition No. 4048/2008, MANU/TN 1969/2008). Same point was highlighted in the written submissions also.

4. On the other hand, Mr. Sanjeev Bhandari, learned counsel for th respondent submitted at the time of oral arguments as well as in his written submissions that the action of the bank in taking over possession of the mortgaged house was totally illegal inasmuch as the demand notice under Section 13(2) of SARFAESI Act was issued on 15.07.2016 while as per many documents placed on record by the respondent the account of the respondent was declared as NPA on 13.08.2016 which renders the subsequent measure taken under Section 13(4) non est. It was also submitted that no fault can be found with the impugned order since the respondent has admittedly paid instalments of loan in advance till 2021. Mr. Bhandari also submitted that in fact, the entire S.A. itself can be decided even by this appellate Tribunal in this appeal itself since the respondent's case is based on documentary evidence already on record and not disputed by the Bank.

5. Mr. A.K.Singh did not dispute that at many places the bank had claimed that the account of respondent was declared as NPA on 13.08.2016 and demand notice was issued on 15.07.201 but that was due to some computer error which the bank will establish during trial but the DRT has without allowing that stage to reach granted mandatory relief which was the final relief claimed in the S.A. to the respondent who still owes over forty lacs of rupees to the Bank for the recovery of which public money already an O.A. also stands filed in DRT. In fact, Mr. Singh submitted that the respondent had himself acknowledged in one of the communications with the Bank that his account was irregular in July, 2016 because he was facing financial problems and so he cannot take shelter under some error in mentioning the date of 13.08.2016 in some documents as the date of NPA. . Regarding the advance payments of instalments, as contended by respondent, Mr. Singh contended that all along the respondent has been asking for time to clear the outstanding instalments but has been failing in doing that and if after receipt of demand notice he has paid some amount he cannot get any benefit from that fact since once loan is recalled after declaration of defaulter's account as NPA the entire amount is to be paid. Mr. Singh also highlighted that the respondent is not as simple a person as he is projecting himself before this Tribunal. He owes over a lacs of rupees even to the Society which constructed the house in question and where he was living earlier. Regarding the. I was further submitted that ever since the order passed by the District Magistrate under Section 14 the respondent has been requesting the Bank to defer taking over possession of his house and the bank was nice enough to accommodate him and now he cannot claim that he has been dispossessed

without notice and the learned DRT ought not to have commented that the Bank has not been fair with the respondent who undisputedly was defaulter in repayment of public money in terms of the loan terms. Mr. Singh wrapped up his submissions by reiterating that all said and done the DRT had no authority to direct the bank to return the possession of its mortgaged asset to the defaulter as an interim measure even on 'superdari' as was being claimed by the respondent and that there was nothing in law which empowers DRTs to order return of mortgaged assets on 'superdari'.

6. In my view on the basis of undisputed documentary material brought on record a prima facie case is made out by the respondent that though demand notice under Section 13(2) was issued on 15.07.2016 but the respondent's account was shown to have been declared as NPA on 13.08.2016. Whether there was any computer error or not in that regard will be for the Bank to establish before the DRT. However, just because of that reason the DRT was not justified in granting the final relief of restitution of possession of the mortgaged house to the respondent by way of an interim direction. The judgment of Madras High Court cited by Mr. A.K. Singh does support the case of the Bank that redelivery of possession back to the borrower cannot be ordered by DRT at an interim stage of the S.A. proceedings.

7. The impugned order is also in the teeth of judgment of the Hon'ble Supreme Court reported in AIR 1985 SC 330 : 1985 SCR (2) 190,

"Assistant Collector of Central Excise Chandan Nagar, West Bengal vs. Dunlop India Ltd. and Ors ." wherein it was observed that:-

"We repeat and deprecate the practice of granting interim order which practically give the principal relief sought in the petition for no better reason than that a prima facie case has been made out, without being concerned about the balance of convenience, the public interest and a host of other relevant considerations................................In Union of India v. Jain Shudha Banaspati Ltd. (supra), Chandrachud, CJ., A. P. Sen, R. N. Misra, JJ. allowed an appeal against an interim order making the following observations:

"After hearing learned counsel for the rival parties, we are of the opinion that the interim order passed by the High Court on November 29, 1983 is not warranted since it virtually grants to the respondents a substantial part of the relief claimed by them in their writ petition. Accordingly, we set aside the said order".

8. Therefore, the impugned order is liable to be set aside. This appeal therefore, succeeds and the impugned order is set aside making it clear that as and when the DRT decides the S.A. finally the present order will not be considered as any kind of opinion of this tribunal in the merits of the rival cases of the parties. Since the respondent stands dispossessed already DRT shall try to decide the S.A on top priority.

