(2016) 04 KL CK 0045

In the High Court Of Kerala

Case No : R.P. No. 981 of 2014 in WP(C) 8259/2009, C.M. Application No. 396 of 2014 in R.P. No. 981 of 2014 and R.P. No. 981 of 2014 in W.P.(C) No. 8259 of 2009

State Bank of India APPELLANT

Vs

Tom Thomas and Others RESPONDENT

Date of Decision : 08-04-2016

Acts Referred:

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 14

Citation : (2016) 04 KL CK 0045

Hon'ble Judges : P.R. Ramachandra Menon, J.

Bench : Single Bench

Advocate : K.K. Chandran Pillai, Sr. Adv. and R.S. Kalkura, Advocate, for the Appellant; P. Sanjay and Shiju Varghese and Jinu Joseph, Advocates, for the Respondent

Final Decision : Allowed

Judgement

P.R. Ramachandra Menon, J.—1. This Review Petition has been filed by the first respondent Bank in W.P.(C) No. 8259 of 2009 seeking to modify the directions in the verdict granting a concession to the writ petitioners by directing the Bank to proceed against the ''residential property'', only if the sale of other items of properties did not fetch adequate amount to satisfy the entire outstanding liability. The verdict was passed on 05.06.2009. Steps were taken against all the remaining 4 items of the property, but due to one or other reasons, such attempts came to be stalled also by way of interim orders passed in various proceedings filed from different corners. No amount has been paid or realised so far, despite the submission made by the writ petitioners before the Court that they earnestly wanted to liquidate the entire liability and the attempt was only to spare the residential property, if possible.

2. Heard the learned Sr. Counsel Mr. K.K. Chandran Pillai, appearing for the review petitioner Bank and Mr. P. Sanjay, the learned counsel for the writ

petitioner.

3. The Review Petition has been filed with a petition to condone the delay of 1942 days in filing the same. The sequence of events, after passing the judgment on 05.06.2009 has been narrated in the affidavit filed in support of the application. The steps taken by the Bank to proceed against the other properties (sparing the residential property, for the time being)so as to give effect to the verdict passed by this Court; the position as on date whereby no amount could be realised during the past seven years and the fact that no payment has been made by the writ petitioners till date, despite their assertion before the Court leading to granting of relief by way of concession on 05.06.2009 have also been explained, thus necessitating the Review. A counter affidavit has been filed by the respondents (writ petitioners) in the Review Petition opposing the reliefs sought for, also pointing out that the Review Petition itself is not maintainable, either on facts or in law.

4. The factual position disclosed from the judgment and the materials on record is that the review petitioner Bank had extended financial assistance to the respondent company against the security interest created in favour of the Bank over ''five'' different items of properties, in which one item having an extent of nearly 13.732 cents belonged to the first petitioner, where a residential building is situated. When steps were taken under the relevant provisions of the SARFAESI Act, the writ petitioners, who were also Directors of the Company had approached this Court by filing W.P.(C)8959 of 2009 challenging the proceedings, wherein notice was ordered. After hearing both the sides, this Court found that the steps being taken by the Bank for realisation of the due amount (which involved crores) was very much in conformity with the statutory prescriptions and not liable to be deprecated. However, taking note of the submission made by the learned counsel for the writ petitioners, asserting that they earnestly wanted the liability to be cleared and that the only attempt was to save their residential property, if possible, the court declared that the sale can go on as scheduled, however, the residential portion would be put to sale, only if the sale of the other extents of properties, to be conducted prior to the sale of residential portion, did not fetch adequate amount to satisfy the entire outstanding liability.

5. The learned Sr. Counsel for the review petitioner points out that the Bank tried to honour the direction given by this Court in the right spirit and perspective and despite many a demand not even a single paise has been satisfied by the writ petitioners during the past seven years. As a matter of fact ''five'' different items of properties were given as security, as noted below:

"1). About 28.5 cents- in the company''s name (28.170 cents)

2) About 7 cents in the name of the first writ petitioner which is lying next to the property belonging to the company

3) About 24.575 cents belonging to the company

4) About 8 cents with the residential building in the name of the second petitioner(8.122 cents)

5) 13.723 cents in the name of the first petitioner plus residential building situated thereon."

The Bank proceeded with steps against the other items. On filing petition under Section 14 of the SARFAESI Act, and on obtaining order appointing an Advocate Commissioner to take possession of the properties, (listed as item Nos. 1 and II), it was forcibly obstructed, also at the instance of the writ petitioners and others, who were acting under them. The Bank even could not have free access to the property and the attempts were turned to be futile.

6. When the Bank proceeded against the ''third item'' of the properties having an extent of 24.575 cents, it was sought to be resisted by one ''Infant Jesus Prayer Hall'' put up in the company''s property, who approached the DRT, Ernakulam by filing S.A. 402/09 and obtained an interim order of stay. This made the Bank to proceed against the 4th item of property (8 cents) in the name of the second petitioner. At this juncture, it was caused to be resisted by filing S.A.468 OF 2009 at the instance of one Mr. V.D. Joy who contended that there was an agreement for sale of the said item in his favour and that, out of the total agreed sale consideration of 12 lakhs, one lakh had already been paid. The said S.A. was admitted also granting an interim order of stay, which barred the way of the Bank in proceeding further. Despite filing counter affidavit in both the cases, the matter was not finalised within a reasonable time, whereupon, the Bank approached the DRAT, for necessary relief. The case was disposed of by the DRAT, directing the matters to be finalised within three months. Despite the said order passed in May, 2011 and inspite of the hearing completed (extending the interim order), no final verdict was passed for nearly two years, whereupon the Bank approached this Court by filing O.P.(DRT) 1 of 2014. This Court was pleased to call for the records and thereafter the matter was directed to be finalised pursuant to which, both the S.A.s were dismissed by the DRT, as per order dated 17.01.2014.

7. Thereafter, the Bank approached the concerned Diocese to get vacant surrender of the prayer hall, whereupon the authorities of the Diocese intimated the Bank that they had not given any permission to put up any prayer hall in the Company''s properties and in the said circumstance, the Bank proceeded with further steps. This was sought to be stalled by filing W.P.(C) No. 13026 of 2014 by the Infant Jesus Prayer Hall, wherein one month''s time was granted to surrender the premises. In the course of further proceedings, the sale was notified three or four times, but on every occasion, it was being stalled with the conscious involvement of the writ petitioners and the others acting under them. Finally, one item was notified to be sold on 10.10.2013, when a representation dated 08.10.2013 was left on the table of the AGM of the Bank(who was not authorised to deal with the issue) and on the next day, they approached this Court by filing W.P.(C)24768 of 2014 (filing as urgent ''today'' item) for disposal

of the representation. The said writ petition was disposed of directing to consider and dispose of the representation, simultaneously intercepting the sale till such time. The sale was held up and subsequently, it was notified in the year 2014; whereupon the petitioner in S.A. 468 of 2014 approached the DRT again, by filing S.A. 271 of 2014. While so, the Bank also proceeded with further steps to liquidate the liability by proceeding against the movables, machinery etc., whereupon the company also approached this Court by filing W.P. (C)29239 of 2014, which is also pending.

8. The I.A. Filed by the petitioner to intercept the sale of the movables was dismissed by this Court on 11.06.2015, referring to the disputed question of facts and the existence of alternate remedy available. In the meanwhile, on proceeding against the 4th item of the property, one purchaser, after satisfying the EMD, offered 70 lakhs and the sale was confirmed in his favour. But the balance amount was not paid and the bidder sought for extension of time. Since the prayer was contrary to the relevant rules, it was rejected by the Bank, whereupon, he approached this Court by filing W.P.(C) 1882 of 2016. The second petitioner in the present writ petition is one of the respondents, who is the owner of the said property, whose consent is necessary to cause the property to be sold and hence notice was ordered. But she has not turned up so far. An interim order was passed permitting the writ petitioner to participate in the sale. But he also has not turned up. It is in the said circumstance, that the review petition has been filed, seeking to modify the ''concession'' already given by this Court, as all the steps taken by the Bank to get the liability liquidated have been thwarted and the writ petitioners have not taken any steps, at least to satisfy even a meagre portion of the liability.

9. According to the writ petitioners, as put-forth by Mr. P. Sanjay, the learned counsel for the writ petitioners, the Review Petition filed at this distance of time is not liable to be entertained, as hopelessly barred because of the inordinate delay. It is also stated that the scope of review is very limited, as there is ''no error apparent on the face of the records'' and further that it cannot be a substitute for appeal. Reliance is sought to be placed on the decision reported in , AIR 1995 SC 455 - (Meera Bhanja v. Nirmala Kumari Choudhuri).

10. The first point to be considered is whether the writ petitioners were having any vested right to get the reliefs granted by this Court as per the judgment dated 05.06.2009, to have proceeded against the residential property only after proceeding against the other items of properties. Absolutely no provision of law or any binding contract or precedents in this regard (if at all any in favour of the writ petitioners), was pointed out before this Court. It is quite settled that mortgagee is entitled to proceed against any of the mortgaged items of properties for realisation of the amount due. The writ petition itself was filed pressing for the only relief as revealed from the paragraphs 3 and 5 of the judgment, contending that the other properties including that of the company were having higher market value and that sale of a portion of the same would be

sufficient to discharge the liability.

11. The relief was stated as confined to enable the writ petitioners to wipe off the liability and to save their residential property, if possible, by causing other properties to be proceeded against first. It was accordingly, that a ''concession'' was given by this Court, as per the judgment dated 05.06.2009 (now sought to be reviewed); paragraphs 3 and 5 of which are relevant and extracted below:

"3. The learned counsel appearing for the petitioners submits that the prayers are now confined only to the extent that, the assets belonging to the second respondent Company and other properties offered by the petitioner having substantial market value (the sale of which itself would fetch much more than the required amount to clear the entire liability) might be proceeded against and the residential property of the petitioner might be dealt with only as the last item. Learned counsel also places reliance on the decisions rendered by the Apex Court to contend that sale can only be with respect to such extent, which is actually enough to satisfy the outstanding liability and that sale is very much permissible even by way of separate/small lots. xx

xxx xx

5. After considering the facts and figures, this court finds that the steps being pursued by the first respondent for realisation of the due amount are very much in conformity with the statutory prescription and hence are not liable to be deprecated. However, taking note of the submission made by the learned counsel for the petitioners asserting that the petitioners earnestly want the liability to be cleared and that the only attempt is to save the residential property, if possible, this Court declares that the sale can go on as scheduled; but the residential portion will be put to sale, only if the sale of the other extents of property to be conducted prior to the sale of the residential portion does not fetch adequate amount to satisfy the entire outstanding liability. With the above observation interference is declined on merits and the Writ petition is disposed of."

12. From the above, it is quite obvious that this Court, while passing the judgment on 05.06.2009, though was quite aware of the vested rights of the secured creditor Bank to proceed against any items of the mortgaged properties, extended only a ''concession'' to the writ petitioners to have the residential property spared for the time being, by setting the Bank at liberty to proceed against the other properties and thereafter to proceed against the residential property as the last attempt, if the sale of the other properties did not generate sufficient funds to liquidate the entire liability. The sequence of events, after passing the judgment as referred to above is not seriously disputed, but for contending that the writ petitioners have not joined hands with any other respondents and are not interested in the affairs of the company or the other assets, but for getting their residential property spared, if possible. The fact remains that the writ petitioners had made a submission before the Court on 05.06.2009, that they earnestly wanted the liability to be cleared and their

attempt was to save their residential property, if possible, which persuaded this Court to think that it was a genuine and bonafide request, thus intercepting the sale proceedings against the residential property for the time being, setting the Bank to proceed against the other properties and to proceed against the residential property only as the last step, if the sale of the other properties did not generate sufficient funds to liquidate the entire liability. This Court finds that, despite the indulgence shown by this Court and inspite of the tolerance displayed by the Bank, taking measures/steps by proceeding against other items, hurdles came to be placed on their way, and not even a portion of the liability is satisfied by the writ petitioners during the past ''seven years''. As such, the consequence resulted because of the ''concession'' extended by this Court requires to be corrected at least, at this distance of time as the principle of "actus curiae neminem gravabit" (act of the court shall prejudice no one)comes into play.

13. This court is very well aware of the decision of the Supreme Court in Meera Bhanja v. Nirmala Kumari Choudhuri (cited supra) holding that the scope of ''review'' shall not be misunderstood as a substitute for appeal. By virtue of the fact that the relief granted to the writ petitioners was only as a matter of ''concession'', to explore the steps to save their ''residential property'' and further since, many an attempt has been taken by the Bank seeking to proceed against all other properties concerned, which turned to be futile, the proceedings have to be taken to a logical conclusion. The attempts made by the Bank were evidently in furtherance to the direction of this Court, honouring the same in the right spirit and perspective. This Court is of the view that there is an error apparent on the face of the records, which requires to be rectified. This Court is also of the view that there is absolutely no instance of any delay on the part of the review petitioner Bank in approaching this Court, as it was very much necessary for them to explore the chances to proceed against the other items of properties and to see whether the liability could be liquidated by other means so as to spare the residential property, as directed by this Court. It was only on realising that all such attempts have been made ineffective, that they are constrained to approach this Court seeking for review of the judgment, by withdrawing the ''concession''. This Court finds that the Bank is fully justified in having filed the present review petition.

14. In the above circumstance, the ''concession'' given by this Court by intercepting the steps for sale of the ''residential property stands withdrawn. Paragraph 5 of the judgment stands corrected as follows:

"After considering the facts and figures, this Court finds that the steps being pursued by the first respondent for realisation of the due amount are very much in conformity with the statutory prescription and hence are not liable to be deprecated. Interference is declined on merits and the writ petition is dismissed."

Both the C.M. Application to condone the delay and the Review Petition stand allowed.