

(2016) 05 CAL CK 0093

In the Calcutta High Court

Case No : M.A.T. 868 of 2013 with CAN No. 6110 of 2013

State Bank of India

APPELLANT

Vs

Ujjal Kumar Das

RESPONDENT

Date of Decision : 05-05-2016

Acts Referred:

Constitution of India, 1950 — Article 21
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13
Security Interest (Enforcement) Rules, 2002 — Rule

Citation : (2017) ACD 18 : (2016) AIR(Calcutta) 281 : (2016) 4 BC 616 : (2016) 3 CalHCN 703 : (2016) 4 CalLT 372 : (2016) 199 CompCas 464 : (2017) 1 DCR 137 : (2017) 1 DRTC 83 : (2017) 1 NIJ 778 : (2016) 5 WBLR 650

Hon'ble Judges : Dr. Manjula Chellur, CJ. and Joymalya Bagchi, J.

Bench : Division Bench

Advocate : Mr. Bikash Ranjan Bhattacharya, Senior Advocate Mr. Subrata Kumar Sinha, Mr. Pal Chowdhury, Mr. Pradip Kr. Pal Choudhuri, Mr. Ashim Kr. Routh, Mr. Sudip Pal Choudhuri, Mr. Sumantha Sarathi Bhowmik, Advocates, for the Appellants in M.A.T. 868 of 2013; Mr.

Final Decision : Disposed Off

Judgement

Dr. Manjula Chellur, C.J.—These two appeals arise out of common judgment and order dated 03.05.2013 in W.P. 10315 of 2013 and W.P. 9850 of 2013.

2. The controversy which got the attention of the Court where impugned judgment is coming from is whether a secured creditor who chooses course of action for enforcement of security in terms of provisions of securitization and reconstruction of financial asset and Enforcement of Security Interest Act of 2002 (hereinafter referred to as SARFAESI Act) is entitled to publish the photograph(s) of the defaulting borrower(s)/guarantor(s) in newspapers/magazines etc. In both the matters the secured creditor was the State Bank of India. The stand of the borrowers was to the effect that publication of photograph(s) of the defaulting

borrower(s)/guarantor(s) as a measure for recovery of loans has no legislative sanction, therefore, the secured creditors must be restrained from proceeding in that direction. According to them, the proposed act to publish photographs, names and addresses of the defaulting borrowers is a coercive step and it fall within the meaning of mischief as defined under Section 15 of the Contract Act 1872. They further contend that proposed action attracts the definition of "defamation".

3. So far as the stand of the respondent Bank/Appellant was that once the debtor defaulted in repayment of amounts borrowed by him, the consequence is, loan account being treated as non-performing assets (generally known as NPA). According to them the expression "public good" and "public interest" as defined in the dictionaries mean that an authority can act for public good/public interest for good reasons by publication of photographs, names and addresses of the defaulting borrower(s)/guarantor(s). According to the secured creditor, subsequent to taking over of the Imperial Bank of India by the Government, it is re-named as State Bank of India. Since Reserve Bank of India acquired substantial holding of shares, it is nothing but emergence of public ownership in the field of commercial Banks. The objective behind nationalisation of Banks clearly indicate, it was with the intention to serve better the needs of development of the economy. Therefore, if NPAs become more and more there be frustration and the very objectivity of nationalisation of Banks is lost.

They further contended that after observation of the Apex Court in AIR 2007 SCC 712 that non-performing asset being a cost to the economy, it became an obligation on the part of public sector banks to formulate different possible legal means and the "SARFAESI" Act is one of such mechanism. Therefore, the effective and quicker procedure under the act for recovery of dues of the secured creditor, once borrowers account has been classified as non-performing asset has to be looked from an angle of public faith, public good and public interest. The proposal to publish photographs according to them was only to alert public so that they can refrain from extending credit facilities to such defaulting borrowers.

4. The appellant Bank placed reliance on AIR 2007 Madhya Pradesh 45 (Kumari Archana Chauhan v. State Bank of India) and so also (2007) 136 Company Cases 568 (Madras) in the case of K.J. Doraiswamy.

5. Learned Judge after making a thorough analysis of the arguments and material-on-record opined that the two judgments have no persuasive value.

6. Apparently, there is no procedure for publication of photographs of the borrowers once the account of the borrower is treated as NPA. One is required to follow the procedure if such procedure is envisaged. Whether rule 8 read with appendix IV provides not only issuance of notice to the defaulting borrower but also notice to general public is to be seen. Rule 8 reads as under:

Rule 8 of the SARFAESI Rules reads as under:

"8. Sale of immovable secured assets:-

(1) Where the secured asset is an immovable property, the authorised officer shall take or cause to be taken possession, by delivering a possession notice prepared as nearly as possible in Appendix IV to these rules, to the borrower and by affixing the possession notice on the outer door or at such conspicuous place of the property.

(2) The possession notice as referred to in sub-rule (1) shall also be published in two leading newspaper one in vernacular language having sufficient circulation in that locality, by the authorised officer.

(3) In the event of possession of immovable property is actually taken by the authorised officer, such property shall be kept in his own custody or in the custody of any person authorised or appointed by him, who shall take as much care of the property in his custody as a owner of ordinary prudence , under the similar circumstances, take of such property.

(4) The authorised officer shall take steps for preservation and protection of secured assets and insure them, if necessary, till they are sold or otherwise disposed of.

(5) Before effecting sale of the immovable property referred to in sub-rule (1) of rule 9, the authorised officer shall obtain valuation of the property from an approved valuer and in consultation with the secured creditor, fix the reserve price of the property and may sell the whole or any part of such immovable secured asset by any of the following methods:-

(a) by obtaining quotations from the persons dealing with similar secured assets or otherwise interested in buying the such assets; or

(b) by inviting tenders from the public;

(c) by holding public auction; or

(d) by private treaty.

(6) The authorised officer shall serve to the borrower a notice of thirty days for sale of the immovable secured assets, under sub-rule (5):

Provided that if the sale of such secured asset is being effected by either inviting tenders from the public or by holding public auction, the secured creditor shall cause a public notice in two leading newspapers one in vernacular language having sufficient circulation in the locality by setting out the terms of sale, which shall include;-

(a) The description of the immovable property to be sold including the details of the encumbrances known to the secured creditor;

(b) The secured debt for recovery of which the property is to be sold;

- (c) Reserve price, below which the property may not be sold;
 - (d) Time and place of public auction or the time after which sale by any other mode shall be completed;
 - (e) Depositing earnest money as may be stipulated by the secured creditor;
 - (f) Any other thing which the authorised officer considers it material for a purchaser to know in order to judge the nature and value of the property.
- (7) Every notice of sale shall be affixed on a conspicuous part of the immovable property and may, if the authorised officer deems it fit, put on the website of the secured creditor on the Internet.
- (8) Sale by any methods other than public auction or public tender, shall be on such terms as may be settled between the parties in writing."

Appendix IV is as under:

"Whereas

The undersigned being the authorised officer of the (name of the Institution) under the Securitisation and Reconstruction of financial Assets and Enforcement of Security Interest [Act, 2002 (54 of 2002)] and in exercise of powers conferred under section 13(12) read with rule 9 of the Security Interest (enforcement) Rules, 2002 issued demand notice dated calling upon the borrower shri...../M/s..... to repay the amount mentioned in the notice being Rs.(in words.....) within 60 days from the date of receipt of the said notice.

The borrower having failed to repay the amount, notice is hereby given to the borrower and the public in general that the undersigned has taken possession of the property described herein below in exercise of powers conferred on him/her under section 13(4) of the said [Act] read with rule 9 of the said rule on this..... day of of the year.....

The borrower in particular and the public in general is hereby cautioned not to deal with the property and any dealings with the property will be subject to the charge of the (name of the Institution) for an amount of Rs..... and interest thereon.

Description of the Immovable Property

All that part and parcel of the property

consisting of Flat No...../Plot No..... In Survey No/City or Town Survey No...../Khasra No. within the registration sub-district..... and District.....

Bounded:

On the North by

On the South by

On the East by

On the West by

Authorised officer

(Name of the Institution)

Date.....

Place"

7. There is no specific mentioning in the above provision how the notice to be published. Apparently, there is no mentioning of publication of photographs of borrowers/guarantors along with the publication of names, assets etc.

8. Reading of the aforesaid Rule indicates no positive prohibition regarding publication of photographs of the defaulters. However, while publishing notice under Sub-Rule 1 of Rule 8 regarding possession of property, certainly it has to be published in two leading newspapers, one in vernacular language having sufficient circulation in that locality. Subsequent provisions refer to what is the procedure to be complied with in the event of taking possession of the property, whether to keep in the custody of the authorised officer or anyone appointed by him, after obtaining valuation of the property etc. It also states, notice of sale shall be affixed on a conspicuous part of the immovable property which not only cautions the borrower the consequences of such notice but also alerts public if public has interest in acquiring such property.

9. The intention and purpose of such Rule, is the Bank can publish the names of the defaulters by giving their names and addresses to make public aware of details of the defaulters thereby cautioning prospective buyers that the property is not only secured to the Bank but the borrowers have become defaulters. There can be an argument that a borrower himself can arrange purchaser for the secured property without adhering to the above procedure but it may amount to violation of the conditions of mortgage or the contract between the borrower and the creditor Bank if the creditor Bank objects. If creditor Bank has no objection for the sale of property through defaulter/borrower, it is altogether a different situation.

10. Many a time the creation of equitable mortgage by deposit of title deeds do not get reflected in the encumbrance certificate obtained from the Sub-Registrar's Office unless such mortgage is followed by a registered memorandum. This may lead to serious consequences i.e. innocent public believing that the property is not encumbered may acquire interest in such property by parting with their money. In order to overcome difficulties of delay in realising dues, through a long process of litigation in the Courts, the Securitization Act has come into force which has the approval of highest Court of the land. It be apt to refer to V.T. Khandoze v. Reserve Bank of India (1982 (2) Supreme Court Cases 7), where it was held Central Board of Directors of the

Reserve Bank are empowered to make regulations in order to provide for all matters for which provision is necessary or convenient for the purpose of giving effect to the provisions of the Act. Reference was made to Attorney General v. Great Eastern Ry. Co. (1880) 5 ACT 473 (HL) in the above case wherein it was held that whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorised ought not to be held by judicial construction as ultra vires (unless expressly prohibited) could be laid down as procedure. One has to see whether there is express legal bar either in the statute or rules thereunder or any other guidelines, directions or norms which expressly prohibit the Bank from publication of photograph.

11. So far as dues to the Bank, the entitlement of the creditor Bank is, they are entitled to file a suit or initiate proceedings under the SARFAESI Act, 2002 for realisation of its dues. They can also resort to other proceedings under the respective statutes of the State for recovery of dues as revenue dues. The notice contemplated under Rule 8 of the Security Act as stated above is not only intended to notify the details of the property secured but also to caution the public from entering into any kind of transaction with the defaulters in respect of the property notified. Of course this also be a precaution to avoid multiplicity of legal battles if third party interest is created by the defaulters.

12. Definitely Court has to see the right of the defaulter so far as his privacy, that is whether the creditor Bank can resort to any course of action as it chooses only with the sole purpose of recovering its dues. There has to be reasonableness in the said purpose in resorting to a particular course of action. It cannot be done recklessly or in a manner which prejudice privacy rights of the individual.

13. Article 21 of the Constitution envisages and protects the interest of citizens of this country by which he has right to live with dignity. By mere default of repayment of loan which may not be on account of intentional default but on account of various reasons which may be beyond the control of the default/borrower, accounts of the borrowers can become non-performing as per the guidelines of the RBI or respective Banks.

14. So far as guidelines of the Reserve Bank of India (RBI), they have to be followed by every Banking Company. We have to see whether there is approval of Reserve Bank of India to resort to this procedure of publishing photograph of the defaulters/guarantors before resorting to further course of action by the secured creditor/Bank for recovery of its dues.

15. Reserve Bank of India by a master circular (DBOD No. CID.BC 10/20.16.003/2012-13 dated 02.07.2012) has notified all the scheduled/commercial Banks with regard to the procedure to be followed against wilful defaulters and the penal measures to be adopted in the course of realisation of the dues. This provides for reporting the details of accounts of wilful defaulters to the Reserve Bank of India as also the Credit Information Companies. The Credit Information Companies are like the Credit Information Bureau (India) Ltd. and

(CIBIL) have been registered under the Credit Information Companies (Regulation) Act of 2005. As per this provision the Credit Information Companies have to disseminate information pertaining to the account of wilful defaulters and the recovery steps initiated on their respective websites. This is only with a purpose to enable any Bank to log on into the website of credit Information Companies to verify the reputation and credential of the prospective borrower who intends to apply for fresh loan on the security of the property already secured to another Bank or financial institution. Such circulars are issued by RBI by virtue of Section 21(3) and 35-A of the Banking Regulation Act, 1949.

16. One cannot ignore the duty of Banks/Financial Companies to disclose necessary information to the public about the borrower if such information has effect of creating economical imbalance. Right of privacy no doubt is an essential component of right to live with dignity as envisaged under Article 21 as a Fundamental Right. This Right of privacy however cannot be absolute but can be lawfully restricted for the prevention of crime, safeguarding the interest of innocent people, disorder or protection of health or morals or protection of rights and freedom of others.

17. The above mentioned circular positively does not empower the Bank/financial institutions to publish photographs of borrowers/guarantors in newspapers though are entitled to provide information in the website of Credit Information Companies. One cannot close eyes to the other side of the problem. Such publication of photographs if borrower/guarantor does not come under the category of a person who is not an intentional/willful defaulter by committing certain acts of dishonest like syphoning of stocks hypothecated to Bank or syphoning of funds towards other purpose other than for which it was lent, may lead to disastrous, consequences by disturbing his mind leading to psychological problems because of stigma or taboo not only upon the borrower but also entire family for years to come. One has to balance the situation and act depending upon the factual situation.

18. So far as above controversy several High Courts have given different opinions. The High Court of Madras in K.J. Doraiswamy v. The Assistant General Manager State Bank of India opined that interest of Bank requiring disclosure of information supersedes duty of secrecy because once a matter becomes public record and it becomes legitimate object of covenant and Right of privacy in terms of Article 21 is not an absolute Right or inviolable Right. It was further opined that Banks are entitled to invent novel methods to recover dues if borrower finds new method to avoid repayment of loans. This definitely indicates that under special circumstances where the borrower invents new methods to evade or avoid payment the Bank can also resort to new methods of recovery. Therefore, Madras High Court opined, there is no violation of any Right or legal proposition by publishing photographs of the borrower.

19. In Kumari Archana Chauhan v. State Bank of India Jablpur AIR 2007 MP 45, Madhya Pradesh High Court Opined that publication of photographs of borrowers

cannot be said to be impermissible and held that the said action was neither arbitrary nor illegal in any manner.

20. In ILR 2013 (3) Kerala 638 (Venu v. State Bank of India) notice was issued by Banks calling upon the borrower to make payment due to the Bank failing which the Bank expressed intention to publish photographs of borrowers with names and address. This was challenged and the High Court opined that there is nothing immoral in being unable to pay the loans availed of owing to the floundering of business or due to some other unavoidable reason which cannot enable the Bank to infringe the Right to privacy of loaners. It further opined that unless there is compelling public interest to publish photographs of the borrowers in newspapers exist, it cannot be resorted to in every default case since routine procedure to publish photographs of every other defaulter may affect Right of privacy of an individual.

21. The High Court of judicature of Bombay had occasion to deal on this subject and the unreported decision in W.P.2808 of 2013 in D.J. Exim (India) Private Limited and others v. State Bank of India and others is placed on record.

22. In this case writ petitioners sought quashing of letter dated 10.10.2013 issued by the respondent Bank intimating the borrowers the intention of the Bank to publish the photographs of the petitioner. The stand of the Bank was the Board of the Bank took a decision regarding publication of photograph only on conclusion and satisfaction that the material placed before it indicated that the borrower had committed various acts of misfeasance and tried to divert the funds which was received by them. The High Court at Bombay Judicature held there was no legal bar either in the rule or under any provisions of the Act prohibiting the Bank from publication photographs of the defaulters in the facts and circumstances of said case.

23. This was challenged in special leave to appeal 37726 of 2013 before the Apex Court by the borrowers. But the same was dismissed.

24. It be just and proper to refer to the opinion of the RBI who was impleaded as a party to the proceedings in order to know its stand so far as publication of photographs of the borrowers of the Bank. The stand of the Reserve Bank of India is reflected before this Court by way of affidavit. It is well established that the Reserve Bank of India regulates and supervises Commercial Banks and Co-Operative Banks in the country in accordance with the provisions of Banking Regulations Act of 1949. It also exercises control over the volume of credit in order to ensure economic stability. So far as the policy it gives directions under Section 21 and Section 35A of the Act. According to RBI it has not issued any direction in exercise of its statutory powers under the above Act on the issue of publication of names and photographs of wilful defaulters/guarantors in newspapers etc. It further places on record the correspondence between the Head Office of the State Bank of India and its offices situated in various parts of the country and so also between the Reserve Bank of India addressed to the

Chairman State Bank of India Credit Policy and Procedures Department, Mumbai as also opinion of Indian Bank Associations. They have also placed on record master circular dated 1.7.2014 consolidated instruction/guidelines issued to all Banks and Financial Institutions till 30th June, 2014 and updated on 7.1.2015. Important guidelines of 2015 issued by RBI are at para 2.1.3 the definition of wilful default. Para 2.2 refers to diversion and siphoning of funds which reads as under:-

"2.1.3 wilful default: A "wilful default" be deemed to have occurred if any of the following events is noted:

- (a) The unit has defaulted in meeting its payment/repayment obligations to the lender even when it has the capacity to honour the said obligations.
- (b) The unit has defaulted in meeting its payment/repayment obligations to the lender and has not utilised the finance from the lender for the specific purposes for which finance was availed of but has diverted the funds for other purposes.
- (c) The unit has defaulted in meeting its payment/repayment obligations to the lender and has syphoned off the funds so that the funds have not been utilised for specific purpose for which finance was availed of, nor are the funds available with the unit in the form of other assets.
- (d) The unit has defaulted in meeting its payment/repayment obligations to the lender and has also disposed of or removed the movable fixed assets or immovable property given for the purpose of securing a term loan without the knowledge of the bank/lender.

The identification of the wilful default should be made keeping in view the track record of the borrowers and should not be decided on the basis of isolated transactions/incidents. The default to be categorized as wilful be intentional, deliberate and calculated.

2.2 Diversion and syphoning of funds

2.2.1 Diversion of Funds: the term "diversion of funds" referred to at paragraph 2.1.3(b) above, should be constructed to include any one of the under noted occurrences:

- (a) Utilization of short-term working capital funds for long term purposes not in conformity with the terms of sanction;
- (b) Deploying borrowed funds for purposes/activity or creation of assets other than those for which the loan was sanctioned;
- (c) Transferring borrowed funds to the subsidiaries/ Group companies or other corporates by whatever modalities;
- (d) Routing of funds through any bank other than the lender bank or members of consortium without prior permission of the lender;

(e) Investment in other companies by way of acquiring /debt instruments without approval of lenders;

(f) Shortfall in deployment of funds vis-a-vis the amounts disbursed/drawn and the difference not being accounted for;

2.2.2 Syphoning of Funds: The terms "syphoning of funds" referred to at paragraph 2.1.3(c) above, should be construed to occur if any funds borrowed from banks/Fls are utilised for purposes unrelated to the operations of the borrower, to the detriment of the financial health of the entity or of the lender. The decision as to whether a particular instance amount to syphoning of funds have to be a judgment of the lenders based on objective facts and circumstances of the case."

25. It further refers to penal measures and also the role of auditors, internal audit etc. with reference to reporting to Credit Information Companies it is at para 2.9 which reads as under:

"2.9 Reporting to Credit Information Companies

(a) Reserve Bank of India has, in exercise of the powers conferred by Section 5 of the Credit Information Companies (Regulations) Act, 2005 and the Rules and Regulations framed thereunder, granted Certificate of Registration to (i) Experian Credit Information Company of India Private Limited, (ii) Equifax Credit Information Services Private Limited , (iii) CRIF High Mark Credit Information Services Private Limited and (iv) Credit Information Bureau (India) Limited (CIBIL) to commence/carry on the business of credit information.

(b) Banks/Fls should submit the list of suit-filed accounts and non-suit filed accounts of wilful defaulters of Rs. 25 lakh and above on a monthly or more frequent basis to all the four Credit Information Companies. This enable such information to be available to the bank/FLS on a near real time basis.

Explanation - In this connection, it is clarified that banks need not report cases where

(i) Outstanding amount falls below Rs. 25 lakh and

(ii) In respect of cases where banks have agreed for a compromise settlement and the borrower has fully paid the compromised amount.

(c) Credit Information Companies (CICs) have also been advised to disseminate the information pertaining to suit filed accounts of wilful defaulters on their respective websites."

26. So far as inclusion of Director Identification Number, it is at para 5.4 which reads as under:

"5.4 Inclusion of Director Identification Number (DIN)

Ministry of Corporate Affairs had introduced the concept of a Director

Identification Number (DIN) with the insertion of Section 266A to 266G in the Companies (Amendment) Act, 2006. In order to ensure that directors are correctly identified and in no case, persons whose names appear to be similar to the names of directors appearing in the list of wilful defaulters, are wrongfully denied credit facilities on such grounds, banks/FIs have been advised to include the Director Identification Number (DIN) as one of the fields in the data submitted by them to Credit Information Companies.

It is reiterated that while carrying out the credit appraisal, banks should verify as to whether the names of any of the directors of the companies appear in the list of defaulter/wilful defaulters by way of reference to DIN/PAN etc. Further, in case of any doubt arising on account of identical names, banks should use independent sources for confirmation of the identity of directors rather than seeking declaration from the borrowing company."

27. From the above discussion and information it is very clear so far as the Act and the rules, there is neither positive direction nor negative indication so far as publication of photographs. Definitely rule 8 is intended to alert the public that the property is encumbered and one should know such encumbrance if anyone intends to deal with such property. Correspondence between the Indian Bank Associations to Reserve Bank of India, and Reserve Bank of India to the chairman State Bank of India Credit Policy and Procedures Department Mumbai in 2007 and the guidelines issued by RBI as updated on 07.01.2015 clearly indicate how and under what circumstances a borrower could be categorized as a wilful defaulter and how the information has to be disseminated to the credit information companies. This clarifies the position that as a matter of routine procedure, one should not resort to publication of photographs of defaulters unless and until there are special circumstances where the borrower with mala fide intention is committing any of the Acts envisaged in the guidelines of RBI which categorize him as a wilful defaulter. In those circumstances the authority can act for public good/public interest for good reasons by publication of photographs, names and addresses of defaulting borrower(s)/guarantor(s). If publication of photographs is otherwise implemented as a routine, there is bound to be serious impact on economy because if a genuine borrower becomes defaulter for various reasons other than the reasons to treat him as "wilful defaulter" in terms of guidelines of RBI, such genuine defaulter be faced with a situation where no one come forward to assist him to come out of the financial crisis. There should not be publication of photograph before proceeding with further course of action under SARFAESI Act only with a view to pressurise the defaulter/guarantor to repay the loan. In other words it amount to undue influence or pressure coming in the way of rights of the borrower attracting Article 21 A of the Constitution of the India i.e. right to live with dignity.

28. Accordingly, the impugned judgment and orders are modified to the above extent by disposing of these appeals.

Joymalya Bagchi, J. - I agree.