
(2008) 02 OHC CK 0046
In the Orissa High Court

Subash Chandra Panda

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 29-02-2008

Acts Referred:

COMPANIES ACT, 1956 — Section 4A
Constitution of India, 1950 — Article 226
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 2
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 17, 2, 31
Transfer of Property Act, 1882 — Section 69, 69A

Citation : AIR 2008 Ori 88 : (2008) 106 CLT 324 : (2008) 1 OLR 659

Hon'ble Judges : A.K. Ganguly, C.J.;B.N. Mahapatra, J

Bench : Division Bench

Judgement

A.K. Ganguly, C.J.—This writ petition has been filed challenging the action taken by the opposite parties in dispossessing the petitioner from his residential house at village Uttara Sasan, P.O. Kausalyaganga, P.S. Pipili, District Puri. He alleges that he has been dispossessed from his house and that dispossession was suppressed by the Collector and the Superintendent of Police, Puri, opposite party Nos. 2 and 3 respectively. It is further alleged that the dispossession of the petitioner was at the instance of opposite party Nos. 6 and 7 on the basis of notice issued u/s 13(2) of the Securitization Act. In the writ petition only notice u/s 13(2) of the Securitization Act has been disclosed and the grievance of the petitioner is that no notice u/s 13(4) of the Securitization Act was given by opposite party Nos. 6 and 7. On the other hand it is submitted on behalf of opposite party Nos. 6 and 7 that the notice u/s 13(4) of the Securitization Act has been given to the petitioner. On perusal of the purported notice dated 1.10.2005, this Court does not find that any separate notice u/s 13(4) of the Securitization Act has been given.

2. Learned Counsel for opposite party Nos. 6 and 7 submits that no notice u/s 13(4) of the Securitization Act is required and as such no separate notice was

given u/s 13(4) of the said Act.

3. It is difficult for us to accept the said contention. It is well settled that notice u/s 13(4) is a must before the financial institution takes any of the measures specified in the said Sub-section.

4. This becomes all the more necessary in view of right of appeal given u/s 17. Unless notice u/s 13(4) is given, the right of appeal which is given u/s 17 of the Statute becomes illusory. This omission, according to the learned Counsel for the petitioner, is a fundamental one and we find that there is a lot of substance in that.

5. It has been urged that opposite party Nos. 6 and 7, namely, Bijayananda Mishra and Sanjaya Sinha, have styled themselves as Authorised Representative and Executive Director of Maharshi Housing Development Finance Corporation Ltd.

6. In the counter affidavit, which has been filed by opposite party No. 6, reference has been made to a notification dated 10.11.2003 issued by the Ministry of Finance (Department of Economic Affairs) (Banking Division). In the said notification some institutions have been notified in exercise of powers conferred under sub-clause (iv) of Clause (m) of Sub-section (1) of Section 2 of the Securitization Act. In the said notification Maharshi Housing Development Finance Corporation Ltd., New Delhi has been notified as a financial institution on and from 10th November, 2003. This fact is not disputed. It is not the case of opposite party No. 6 that prior to 10th November, 2003 the said institution has been notified under the said Act as a financial institution.

7. The agreements in respect of the action which has been taken u/s 13 of the Securitization Act have been disclosed in the counter affidavit of opposite party No. 6 from which it appears that the agreements are dated 26.5.2001 and 13.2.2002. The first agreement was for loan of an amount of Rs. 1 lakh and the second agreement was for an amount of Rs. 2 lakhs. The entire action u/s 13 has been initiated by opposite party Nos. 6 and 7 against the petitioner in order to realize loan amount given to the petitioner under the aforesaid two agreements.

8. Now the question is whether by virtue of the notification dated 10.11.2003 issued by the Central Government notifying it to be a financial institution, it can initiate such proceeding u/s 13 of the Securitization Act in respect of those two loan agreements of 2001 and 2002.

9. This question has been answered by the statute itself. Section 13(1) and 13(2) of the said Act are set out below:

13. Enforcement of security interest - (1) Notwithstanding anything contained in Section 69 or Section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the Court or tribunal, by such creditor in accordance with the provisions of this Act.

(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 instalment 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 Sub-section (4).

10. From a perusal of those provisions, it appears that in order to invoke them, the opposite party must show that, "security interest" has been created in favour of any "secured creditor". If it is so created it can be enforced without the intervention of the Court or Tribunal, by such creditor in accordance with the provisions of the said Act. In the said Act the expressions "secured creditor" and "security interest" have been defined. "Secured creditor" has been defined in Section 2(zd) which definition is as follows:

(zd) "secured creditor" means any bank or financial institution or any consortium or group of banks or financial institutions and includes-

- (i) debenture trustee appointed by any bank or financial institution; or
- (ii) securitization company or reconstruction company, whether acting as such or managing a trust set up by such securitization company or reconstruction company for the securitization or reconstruction, as the case may be; or
- (iii) any other trustee holding securities on behalf of a bank or financial institution,

in whose favour security interest is created for due repayment by any borrower of financial assistance;

"Security interest" has also been defined in Section 2(zf) to read as follows:

(zf) "security interest" means right, title and interest of any kind whatsoever upon property, created in favour of any secured creditor and includes any mortgage, charge, hypothecation, assignment other than those specified in Section 31;

If we deal with those two definitions, it would be clear that "secured creditor" means a bank or financial institution or group of banks or financial institutions and "security interest" has been defined to mean right, title and interest of any kind whatsoever upon property, created in favour of any secured creditor and includes any mortgage, charge hypothecation etc.

11. Therefore, unless on the date the impugned agreement was entered into, between the petitioner and the opposite party Nos.6 and 7, the opposite party No. 6 has become a secured creditors within the meaning of Section 2(zd) of the said Act, no security interest can be created in its favour. So they cannot invoke the provisions of Section 13 of the said Act.

12. The expression "borrower" defined in Section 2(f) of the said Act makes the position further clear. The definition of "borrower" is set out below:

(f) "borrower" means any person who has been granted financial assistance by any bank or financial institution or who has given any guarantee or created any mortgage or pledge as security for the financial assistance granted by any bank or financial institution and includes a person who becomes borrower of a securitization company or reconstruction company consequent upon acquisition by if of any rights or interest of any bank or financial institution in relation to such financial assistance.

A perusal of the said definition would make it clear that "borrower" would mean any person who has been granted financial assistance by any bank or financial institution.

13. Therefore, on a conjoint reading of Section 2(f), 2(m)(iv), 2(zd) and 2(zf), it is clear that in order to invoke the provisions of Section 13 of the said Act on the date the alleged agreement was entered into, opposite party No. 6 must be a financial institution and a secured creditor within the meaning of the said Act.

14. It is clear that prior to the notification dated 10.11.2003, the opposite party No. 6 was not a financial institution within the meaning of Section 2(m)(iv) of the Act. Since it was not a financial institution, it was not a secured creditor and it cannot invoke the provisions of the said Act in respect of a loan transaction of a prior date.

15. The definition of "financial institution" u/s 2(m) of the said Act has several classifications. Section 2(m)(i) is meant for public financial institution within the meaning of Section 4A of the Companies Act. Section 2(m)(ii) is meant to include any institution specified by the Central Government under sub-clause (ii) of Clause (h) of Section 2 of the Recovery of Debts Due to Banks and Financial Institutions Act and u/s 2(m)(iii) means the International Finance Corporation established under the International Finance Corporation (Status, Immunities and Privileges) Act, 1958. Admittedly opposite party No. 6 is not coming under any of sub-clauses of Section 2(m)(i), (ii), (iii).

16. Opposite party No. 6 has been declared a financial institution only by the notification and the said notification takes effect from 10.11.2003 prospectively and not from a prior date. Therefore, the fact remains that by the time the alleged agreement was entered into between opposite party No. 6 and petitioner, i.e. on 26.5.2001 and 6.5.2002, opposite party No. 6 Maharshi Housing Development Finance Corporation Ltd., was not a financial institution within the meaning of Section 2(m)(iv) of the said Act and not being a financial institution it was not a secured creditor and could not invoke the provisions of Section 13 of the Securitization Act. Nor the petitioner was a "borrower" under the definition of Section 2(f) on 26.5.2001 or on 6.5.2002 since a borrower means a person who has been granted financial assistance by a financial institution. Opposite party No. 6 not being a financial institution either on 26.5.2001 or on 6.5.2002,

whatever loan it might have granted to the petitioner on that date was not any financial assistance given to the petitioner by a financial institution within the meaning of Section 2(m)(iv).

17. Learned Counsel for the opposite party Nos. 6 and 7 has relied on two judgments in order to contend that this writ petition is not maintainable. The first judgment on which reliance was placed was in the case of A. Venkatramani v. LIC Housing Finance Limited, reported in (2007) 135 CompCase 514 (Mad.). In that judgment reliance was placed on the observations of the learned Single Judge to the effect that the writ petitions are not maintainable, as there is an alternative remedy u/s 17 of the Securitization Act.

18. Learned Counsel also placed reliance on a Division Bench judgment of the Madras High Court in the case of Digivislon Electronics Ltd. v. Indian Bank reported in (2005) 126 Comp Case 630 Mad. In that judgment also reliance was placed on the same principle that Section 17 of the Securitization Act provides for a remedy before the Debts Recovery Tribunal. In that judgment an observation was also made that the writ Court should not interfere on mere technical ground in favour of the petitioner.

19. In our view the principles laid down in the aforesaid two judgments on which reliance was placed by the learned Counsel for opposite party No. 6 do not apply to the facts and circumstances of this case.

20. Learned Counsel for the petitioner has relied on a judgment of the Supreme Court in the case of (Mrs.) Sanjana M. Wig v. Hindustan Petro Corporation Ltd. reported in 2005 (35) LabIC 945. In that case it has been held by the learned Judges that the remedy under Article 226 of the Constitution should not be denied and in an appropriate case, inspite of availability of the alternative remedy. The learned Judges relied on the principles laid down in Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, where it has been held that the High Court may, despite the existence of alternative remedy, still exercise its writ jurisdiction at least in three situations, i.e., (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged.

21. We are of the view, for the reasons discussed above, that in the facts of this case, the proceeding u/s 13 of the Act against the petitioner is without jurisdiction. This case is coming under the third principle. So the writ petition is maintainable.

22. Learned Counsel for the State submits that the petitioner has filed a civil suit before the Civil Court praying for injunction. We are of the view that even if a suit has been filed and whatever relief might have been sought for in the said suit, since the action of opposite parties in dispossessing the petitioner from his residential house is without jurisdiction and authority of law, the present writ petition is not barred.

23. From the discussion which has been made hereinabove, it is clear that on the dates on which the alleged transactions were made between the petitioner and the opposite party No. 6, it was not a financial institution within the meaning of Securitization Act and it could not invoke Section 13. That being the position, the notice which is issued to the petitioner u/s 13(2) of the Securitization Act is without jurisdiction. It is highly doubtful whether any notice u/s 13(4) was given. Even if it is given for the same reason it is wholly without jurisdiction and the proceeding on the basis of which the petitioner has been dispossessed from his residential property is illegal and without any authority of law. Thus, the entire action of opposite party No. 6 is unauthorized, illegal and bad in law.

24. For the aforesaid reasons, we quash the notice u/s 13(2) under Annexures-1 and 2 and also the notices under Annexures 3 and 4 which have been issued to the petitioner by invoking the provisions of the Securitization Act.

25. We declare that in the facts and circumstances of this case opposite party No. 6 is not entitled to invoke the provisions of the Securitization Act against the petitioner in respect of the alleged loan agreements dated 26.5.2001 and 13.2.2002.

26. We, therefore, direct opposite party Nos. 2, 3, 4, 5, 6 and 7 to restore possession of the residential house to the petitioner within a period of 10 days from the date of service of this order upon opposite party Nos. 2, 3, 6 and 7. This time limit is peremptory in nature. After possession of the house is restored to the petitioner, the petitioner is at liberty to initiate appropriate proceeding before the Civil Court for damages against the opposite parties. The writ petition is allowed with costs which is assessed at Rs. 10 (ten) thousand to be paid by Maharshi Housing Development Finance Corporation Ltd. in favour of the petitioner within two weeks from today.

The writ petition and Misc. Case Nos. 9481, 12087 & 13136 of 2007 are disposed of.

B.N. Mahapatra, J.

27. I agree.