(2006) 11 SC CK 0015

In the Supreme Court Of India

Case No : WA No. 370 of 2006

Sundaram Home Finance Ltd. APPELLANT

Vs

Tahsildar, Hosur and Another RESPONDENT

Date of Decision : 17-11-2006

Acts Referred:

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 13(1), 13(2), 13(4), 14
Transfer of Property Act, 1882 — Section 69, 69A

Citation : (2006) 11 SC CK 0015

Hon'ble Judges : A.P. Shah, C.J;Prabha Sridevan, J

Bench : Division Bench

Advocate : P.S. Raman, S.C, for the Appellant; A.L. Somayyaji, for the Respondent

Final Decision : Allowed

Judgement

1. The question raised in this writ appeal is whether a notice needs to be issued u/s 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ('the Act') before invoking Section 14 thereof. In the judgment under Appeal, it was held that there is a statutory requirement to issue a notice u/s 13(4) of the Act before invoking Section 14. Learned senior counsel appearing for the Appellant submitted that there is nothing in the Act which. contemplates the issuance of another notice u/s 13(4) before taking possession of the security interest. The only notice-contemplated is u/s 13(2), which gives the borrower 60 days to regularise his account and in default thereof, the financial institution was entitled to take action u/s 3(4) of the Act.

2. Mr. A.L. Somayaji, learned additional Advocate General, was requested to assist the court, since the question involved in the present case is a pure question of law.

3. Chapter III of the Act deals with enforcement of security interest and Section

13 reads as follows:

73. 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 the 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).

(3) The notice referred to in Sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower.

(3A) If, on receipt of the notice under Sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within one week of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower:

Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal u/s 17 or the court of District Judge u/s 17A.

(4) In case the borrower fails to discharge his liability in full within the period specified in Sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

(c) appoint any person (hereinafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

Sub-section (3A) was inserted by the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2004 with effect from 11th November, 2004.

4. The challenge to the Act was set at rest by the Supreme Court in Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc., . The following paragraphs of the above judgment are relevant:

45. In the background we have indicated above, we may consider as to what forums or remedies are available to the borrower to ventilate his grievance. The purpose of serving a notice upon the borrower under Sub-section (2) of Section 13 of the Act is, that a reply may be submitted by the borrower explaining the reasons as to why measures may or may not be taken under Sub-section (4) of Section 13 in case of non-compliance with notice within 60 days. The creditor must apply its mind to the objections raised in reply to such notice and an internal mechanism must be particularly evolved to consider such objections raised in the reply to the notice. There may be some meaningful consideration of the objections raised rather than to ritually reject them and proceed to take drastic measures under Sub-section (4) of Section 13 of the Act. Once such a duty is envisaged on the part of the creditor it would only be conducive to the principles of fairness on the part of the banks and financial institutions in dealing with their borrowers to apprise them of the reason for not accepting the objections or points raised in reply to the notice served upon them before proceeding to take measures under Sub-section (4) of Section 13. Such reasons, overruling the objections of the borrower, must also be communicated to the borrower by the secured creditor. It will only be in fulfilment of a requirement of reasonableness and fairness in the dealings of institutional financing which is so important from the point of view of the economy of the country and would serve the purpose in the growth of a healthy economy. It would certainly provide guidance to the secured debtors in general in conducting the affairs in a manner that they may not be found defaulting and being made liable for the unsavory steps contained under Sub-section (4) of Section 13. At the same time, more importantly, we must make it clear unequivocally that communication of the reasons for not accepting the objections taken by the secured borrower may not be taken to give occasion to resort to such proceedings which are not permissible under the provisions of the Act. But communication of reasons not to accept the objections of the borrower, would certainly be for the purpose of his knowledge which would be a step forward towards his right to know as to why his objections have not been accepted by the secured creditor who intends to resort to harsh steps of taking over the management/business of, viz., secured assets without intervention of the court. Such a person in respect of whom steps u/s 13(4) of the Act are likely to be taken cannot be denied the right to know the reason of non-acceptance and of his objections. It is true, as per the provisions under the Act, he may not be entitled to challenge the reasons communicated or the likely action of the secured creditor at that point of time unless his right to approach the Debts Recovery Tribunal as provided u/s 17 of the Act matures on any

measure having been taken under Sub-section (4) of Section 13 of the Act.

46. We are holding that it is necessary to communicate the reasons for not accepting the objections raised by the borrower in reply to the notice u/s 13(2) of the Act, more particularly for the reason that normally in the event of non-compliance with notice, the party giving notice approaches the court to seek redressal but in the present case, in view of Section 13(1) of the Act the creditor is empowered to enforce the security himself without intervention of the court. Therefore, it goes with logic and reason that he may be checked to communicate the reason for not accepting the objections, if raised and before he takes the measures like taking over possession of the secured assets, etc.

47. This will also be in keeping with the concept of right to know and lender's liability of fairness to keep the borrower informed particularly of the developments immediately before taking measures under Sub-section (4) of Section 13 of the Act. It will also cater to the cause of transparency and not secrecy and shall be conducive in building an atmosphere of confidence and healthy commercial practice. Such a duty, in the circumstances of the case and the provisions, is inherent u/s 13(2) of the Act.....

51. However, to a very limited extent jurisdiction of the civil court can also be invoked, where for example, the action of the secured creditor is alleged to be fraudulent or his claim may be so absurd and untenable which may not require any probe whatsoever or to say precisely to the extent the scope is permissible to bring an action in the civil court in the cases of English mortgages. We find such a scope having been recognized in the two decisions of the Madras High Court which have been relied upon heavily by the learned Attorney General as well appearing for the V. Narasimhachariar Vs. Egmore Benefit Society, 3rd Branch Ltd., , a judgment of the learned Single Judge where it is observed as follows in para 22:

The remedies of a mortgagor against the mortgagee who is acting in violation of the rights, duties and obligations are twofold in character. The mortgagor can come to the court before sale with an injunction for staying the sale if there are materials to show that the power of sale is being exercised in a fraudulent or improper manner contrary to the terms of the mortgage. But the pleadings in an action for restraining a sale by mortgagee must clearly disclose a fraud or irregularity on the basis of which relief is sought - Adams v. Scott (1859) 7 WR 213, 249. I need not point out that this restraint on the exercise of the power of sale will be exercised by Courts only under the limited circumstances mentioned above because otherwise to grant such an injunction would be to cancel one of the clauses of the deed to which both the parties had agreed and annul one of the chief securities on which persons advancing moneys on mortgages rely. (See Ghose, Rashbehary-Law of Mortgages, Vol. II, 4th edn., p. 784)....

76. In regard to the submission made by the parties as indicated in the preceding paragraphs, we would like to make it clear that issue of a notice to the

debtor by the creditor does not attract the application of the principles of natural justice. It is always open to tell the debtor what he owes to repay. No-hearing can be demanded from the creditor at this stage. So far as the provision of appeal is concerned, we have already discussed in the earlier part of the judgment that proceedings u/s 17 of the Act have been wrongly described as appeal before the Debts Recovery Tribunal. It is in fact a forum where proceedings are originally initiated in case of any grievance against the creditor in respect of any measure taken under Sub-section (4) of Section 13 of the Act. Hence, the decisions on the point as to whether provision for an appeal is essential or not are not of any assistance in the facts of the present case.

The answer to the Appellant's question is found in paragraph 45 extracted above, which requires the creditor to apply its mind to the objections raised in the reply notice u/s 13(2) of the Act. There must be some meaningful consideration of the objections and not a ritual rejection, to be followed up by the measures under Sub-section (4) of Section 13. If the Supreme Court had found on a reading of Section 13(2) and Section 13(4) that before proceeding u/s 13(4) of the Act, a notice to be issued, the words "rather than to ritually reject them and proceed to take drastic measures....." would not have been made. Therefore, it is clear that the intention of the creditor to proceed against the assets unless a satisfactory objection is received from the borrower, is expressed only once and that is by the notice u/s 13(2) of the Act. In fact, it is seen from a reading of paragraph 45 above, that banks and financial institutions should appraise the borrowers of their reason for not accepting the objections or points raised in reply to the notice before proceeding to take measures under Sub-section (4). These reasons over-ruling the objections of the borrower must also be communicated to the borrower by the secured creditor. Section 13(2) calls upon the borrower to state his objections as to why measures shall not be taken under Sub-section (4) of Section 13. So, once those objections are over-ruled, the consequences follow. There does not appear to be an occasion for another notice informing the intent to proceed.

5. The judgment in Mardia Chemical's case also makes it clear that the rejection of the objections does not give the borrower an occasion to resort to proceedings which are not permissible under the provisions of the Act. An attack of unreasonableness or arbitrariness cannot be made, thereby bypassing the scheme of the Act. But, the communication of reasons to the borrower must most certainly be made, for it is a step towards his right to know that his objections have not been accepted by the secured creditor who intends to resort to the subsequent harsh steps without the intervention of the court. His right to approach the Tribunal u/s 17 matures only when any of the measures contemplated u/s 13(4) have been taken. Paragraphs 46 and 47 above stress the reason for communicating the rejection of the objections, viz., in the interest of transparency and to build an atmosphere of confidence and healthy commercial practice.

6. In Digivision Electronics Ltd. Vs. Indian Bank, the question was whether the action under the Act can be taken without permission of the Debts Recovery Tribunal, before whom an Application is pending, unless such an action had been initiated by issuing notice u/s 13(2) of the Act A reading of this judgment also indicates that after the notice u/s 13(2) and the consideration of the objections there against, there is no intermediate notice u/s 13(4) of the Act. Where the challenge was to the notice u/s 13(2) of the Act, the Division Bench rejected it on the ground of availability of alternative remedy of filing a reply; and where the challenge was to the notice Section 13(4) of the Act, that was also rejected on the ground of availability of alternative remedy of filing an Application u/s 17.

7. In The Commissioner of Sales Tax, U.P., Lucknow Vs. Parson Tools and Plants, Kanpur, , the Supreme Court held as follows:

We have said enough and we may say it again that where the legislature clearly declares its intent in the scheme and language of a statute, it is the duty of the court to give full effect to the same without scanning its wisdom or policy, and without engrafting, adding or implying anything which is not congenial to or consistent with such expressed intent of the law-giver; more so if the statute is a taxing statute. We will close the discussion by recalling what Lord Hailsham in Pearlberg v. Varty, [1972] 2 All ER 6 has said recently, in regard to importation of the principles of natural justice into a statute which is a clear and complete Code, by itself:

It is true of course that the courts will lean heavily against any construction of a statute which would be manifestly fair. But they have no power to amend or supplement the language of a statute merely because in one view of the matter a subject feels himself entitled to a larger degree of say in the making of a decision than a statute accords him. Still less is it the functioning of the courts to form first a judgment on the fairness of an Act of Parliament and then to amend or supplement it with new provisions so as to make it conform to that judgment'.

8. In Union of India and another Vs. Deoki Nandan Aggarwal, , the Supreme Court observed as follows:

We are at a loss to understand the reasoning of the learned Judges in reading down the provisions in paragraph 2 in force prior to 1st November, 1986 as "more than five years" and as "more than four years" in the same paragraph for the period subsequent to 1st November, 1986. It is not the duty of the court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature the court could not go to its aid to correct or make up the deficiency. Courts shall decide what the law is and not what it should be. The court of course adopts a construction which will carry out the obvious intention of the legislature but could not legislate itself. But to invoke judicial activism to set at naught legislative judgment is subversive of the constitutional harmony and comity of instrumentalities-vide P.K. Unni Vs. Nirmala Industries and others [OVERRULED], ; Mangilal Vs. Suganchand Rathi, Sri Ram Ram Narain Medhi Vs. The State of Bombay, ; Shrimati Hira Devi and Others Vs. District Board, Shahjahanpur, Nalinakhya Bysack Vs. Shyam Sunder Haldar and Others, ; Gujarat Steel Tubes Ltd. and Others Vs. Gujarat Steel Tubes Mazdoor Sabha and Others, G. Narayanaswami Vs. G. Pannerselvam and Others, N.S. Vardachari Vs. G. Vasantha Pai and Others, Union of India (UOI) Vs. Sankalchand Himatlal Sheth and Another, and Commissioner of Sales Tax, U.P. Vs. Auriaya Chamber of Commerce, Allahabad, Modifying and altering the scheme and applying it to others who are not otherwise entitled to under the scheme, will not also come under the principle of affirmative action adopted by Courts sometimes in order to avoid discrimination. If we may say so, what the High Court has done in this case is a clear and naked usurpation of legislative power.

9. The words of the section and the law laid down in Mardia Chemical's case (supra) do not envisage a notice u/s 13(4). Reasons for not accepting the objection are to be communicated before taking measures like taking over possession of the secured assets. This is the fairness that is required of the lender. But if the borrower has not responded to the notice u/s 13(2), the lender has no occasion to communicate his reasons, necessarily the tender proceeds to the next stage. The borrower gets a right to challenge the action only after any of the measures contemplated u/s 13(4) have been taken. It is clear from the paragraphs extracted above from Mardia Chemical's case that the communication of the reasons may not be taken to give an occasion to resort to such proceedings which are impermissible under the Act. A person who does not respond to the notice u/s 13(2) of the Act should be considered to be aware of the consequences that will follow. In any event, it is not possible to hold that a borrower who has not responded to the notice u/s 13(2) will be entitled to a notice u/s 13(4), whereas, in respect of a borrower who has responded to a notice u/s 13(2) and has had the rejection communicated by the bank, the bank can proceed straightaway to take the measures contemplated u/s 13(4). There is no room for visualising two such courses of action. This will be reading words into the section, which the legislature had not used. It is not our duty to legislate. The Supreme Court also was aware that "some of the provisions may be a bit harsh for some of the borrowers", yet has not, in its judgment, held that a pre-Section 13(4) notice must be issued. We are unable to read a requirement of such notice either in the section or in the judgment.

10. At the same time, the banks and financial institutions may well bear in mind paragraph 51 above, where there is reference to the extent to which the jurisdiction of a civil court can be invoked where the action of the secured creditor is alleged to be fraudulent or their claim may be so barred or untenable which may not require any proof, for which purpose, the Supreme Court referred

to two decisions of the Madras High Court. The Supreme Court has also taken note of the lender's liability. Before the Supreme Court, it was repeatedly emphasised that the Act is loaded against the borrowers and no provision regarding the liability of the lenders had been made. Paragraph 71 of the judgment in Mardia Chemical's is relevant regarding the duty of the lenders;

Arguments have been advanced as to how far principles of lender's liability are applicable. Whatever be the position, however, it cannot be denied that the financial institutions, namely, the lenders owe a duty to act fairly and in good faith. There has to be a fair dealing between the parties and the financing companies/institutions are not free to ignore performance of their part of the obligation as a party to the contract. They cannot be free from it. Irrespective of the fact as to whatever may have been held in decisions of some American Courts, in view of the facts and circumstances and the terms of the contract and other details relating to those matters, that may or may not strictly apply, nonetheless, even in absence of any such decisions or legislation, it is incumbent upon such financial institutions to act fairly and in good faith complying with their part of obligations under the contract. This is also the basic principle of the concept of lender's liability. It cannot be a one sided affair shutting out all possible and reasonable remedies to the other party, namely, borrowers and assume all drastic powers for speedier recovery of NPAs. Possessing more drastic powers calls for exercise of higher degree of good faith and fair play. The borrowers cannot be left remediless in case they have been wronged against or subjected to unfair treatment violating the terms and conditions of the contract. They can always plead in defence deficiencies on the part of the banks and financial institutions." [p 413 of 59 CLA]

We would like particularly to lay stress on the words "possessing more drastic powers calls for exercise of higher degree of good faith and fairplay.

11. The directions given by the Supreme Court in Mardia Chemical's case have now been introduced as Section 3A, also giving the time limit, within which the reasons for non-acceptance should be indicated. Section (3A) is extracted hereunder:

[(3A) If, on receipt of the notice under Sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within one week of receipt of such representation or objection the reasons for non-acceptance of the representation or the objection to the borrower:

Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an Application to the Debts Recovery Tribunal u/s 17 or the court of District Judge u/s 17A].

As regards the procedure to be taken, after issuance of Section 13(2) notice, Rules 4, 5, 6, 7, 8 and 9 are provided for. Rule specifically requires the delivery of a possession notice to the borrower and as per Rule 9, it is only on expiry of 30 days from the date of issuance of Rule 8 notice that a sale of immovable property can take place.

12. In a different context, while dealing with the constitutional validity of the Terrorist and Disruptive Activities (TADA Act), the Supreme Court observed that this kind of invocation of the provisions of TADA Act "in cases, the facts of which do not warrant, is nothing but sheer misuse and abuse of the Act by the police. Unless the public prosecutors rise to the occasion and discharge their onerous responsibility keeping in mind that they are prosecutors on behalf of the public, it cannot be said that the provisions of the TADA Act are enforced effectively in consonance with the legislative intent." Paraphrasing the same in the present context, we may say, therefore, "if invocations of the provisions of the Act in cases where it is not warranted or where it is unjustified are recklessly resorted to, it would amount to flagrant abuse of the Act", Perhaps, it is this fear of possible abuse by the lenders that prevailed upon the learned Single Judge to read into Section 13(4), the requirement of a notice. For all these reasons, the writ Appeal is allowed and the direction to the second Respondent to issue a prior notice u/s 13(4) of the Act is set aside. However, there will be no order as to costs. Consequently WAMP No. 784 of 2006 is closed.