
(2006) 09 GAU CK 0038
In the Gauhati High Court
Case No : Writ Petition (C) No. 4568 of 2006

Sushil Kumar Agarwalla and Another APPELLANT
Vs
State of Assam and Another RESPONDENT

Date of Decision : 15-09-2006

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 20
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(2), 13(4), 17, 31, 34

Citation : (2007) 2 BC 695 : (2006) 134 CompCas 14 : (2009) 3 GLR 693 : (2006) 4 GLT 601

Hon'ble Judges : B.K. Sharma, J

Bench : Single Bench

Advocate : D.K. Mishra, K.R. Suraka and G. Khandelia, for the Appellant; A.C. Borbora Singh and R. Chakraborty, for the Respondent

Final Decision : Dismissed

Judgement

B.K. Sharma, J.—The petitioners, while admitting at least the liability of the repayment of the principal amount of loan amounting to Rs. 1,17,06,398.69 payable to the respondent-bank, and disputing the interest charged to the tune of Rs. 35,51,556.95 have challenged the notice issued u/s 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short SARFAESI Act, 2002) on the following grounds:

1. The Act does not apply to the case as per provisions of Section 31(i) of the Act, the security interest created being agricultural land.
2. Not following the pre-requirement of dealing with the objection raised in respect of the impugned notice u/s 13(2) of the Act.
3. The respondent-bank could not have included the amount relating to interest in the demand made by the impugned notice, inasmuch as the Bakijai Officer of the Co-operative Societies has already held the same to be not recoverable.

4. The bank already having invoked the jurisdiction under Bengal Public Demands Recovery Act, 1913, cannot now take recourse to SARFAESI Act, 2002.

2. The basic facts are not in dispute. The petitioners applied for financial assistance to respondent No. 2-bank, i.e., the Assam Co-operative Apex Bank Ltd. in order to facilitate expansion of its tea estates. According to the petitioners the bank delayed the process of disbursement of the amount by about two years. The financial assistance sanctioned by the bank was under the following heads.

a. Working Capital Assistance (hereinafter referred to as "WCA" for short) amounting to Rs. 95.70 lakh bearing interest at 14.75 per cent, per annum vide sanction letter No. ACAB/HO/ADV. TEA/CC/ 2002/3686-3689 dated May 11, 2002, against the loan proposal for season 2002-2003.

b. Medium term loan (hereinafter referred to as "MIL" for short) amounting to Rs. 50,47,315 bearing interest at 14.50 per cent. per annum vide sanction letter No. ACAB/HO/TEA/MT/2002/4047-60 dated July 8, 2002.

3. It is the case of the petitioners that due to the delay in disbursement of the promised loan, and owing to non-disbursement of the entire sanctioned loan, the petitioners suffered financial loss to the extent of Rs. 75,00,000 in their business resulting in delay in repayment of the instalments towards liquidation of the loan. However, they have asserted that they have the honest intention to repay the loan.

4. On failure of the petitioners in making the timely repayment of the loan, the respondent-bank initiated Bakijai/Certificate proceeding against the petitioners before the Bakijai Officer of the Co-operative Societies as per the provisions of the Assam Co-operative Societies Act, 1949, read with the provisions of the Bengal Public Demands Recovery Act, 1913("BPDR Act"). The proceeding was registered and numbered as Bakijai Case No. B-13/2005 for recovery of the total amount of Rs. 1,57,98,892.64. The break-ups of this total amount are as follows:

(Rs.) A. Principal 1,17,06,398.69 B. Interest 40,81,493.95 C. Court fee 11,000
Total claim 1,57,98,892.64

5. The Bakijai Officer, by his judgment and order dated March 1, 2006, upheld the certificate in respect of the principal amount of Rs. 1,17,06,398.69, but did not pass order for payment of the interest. However, it was provided in the order that the issue regarding the payment of interest by the certificate debtor, i.e., the petitioners could be considered provided the certificate holder, i.e., the banks submitted correct statements of accounts pertaining to interest keeping in mind the observations made in the order. Thus, although the interest was not awarded in the order it was kept open to be decided in due course.

6. Being aggrieved by the aforesaid judgment and order passed by the certificate officer, the petitioners have preferred an appeal u/s 51(1)(a) of the BPDR Act, 1913, and the same is purportedly pending before the Deputy Commissioner, Kamrup.

7. In the meantime, the bank has issued the impugned notice u/s 13(2) of the SARFAESI Act, 2002, making a demand of Rs. 1,57,87,892.64 which is inclusive of the interest claimed. The amount has been calculated up to May 31, 2005, with the indication of further interest and incidental expenses and cost, etc. Along with the notice, the bank has also enclosed the particulars of the credit facilities by way of financial assistance and the security agreements/documents executed by the petitioners as indicated in Schedules A and B excluding pledge of movables. The notice also indicates that as per an agreement executed on May 24, 2002, the properties of the particular tea estate would continue to be mortgaged, charged and hypothecated to the bank for all loans raised. The relevant particulars of the secured assets have been specifically stated in Schedule C, which reads as follows:

Schedule C Part I

All the hypothecated properties, viz., current assets including stocks, book, debts, receivables, consumable stores and spares and hypothecated movable plant and machinery, etc., mentioned in the documents in Schedule B.

(i) The entire crop of green leaf and manufactured tea.

(ii) The plants and machineries in the factory.

Part II

The particulars of the immovable properties mortgaged to the bank as stated in the documents having reference to the mortgage documents/deed in Schedule B.

patta Dag Nos. Village Mouza Total lands (area) No. 96 24, 51, 61, 62, 75, 79, 81,119,142, Maibelia Nakachari 55B-OK-19L 190, 191,192, 193, 194, 210, 212, Chakial 213, 237, 270, 279, 318, 319, 327, 331, 332, 333, 378 193 459, 460, 469, 520, 521, 522, 530, Gharphalia Nakachari 93B-2k-7L 582, 583, 581, 579, 621, 623, 626, Maibelia 650, 655, 656 1 518, 523, 535, 577, 578, 580, 584, Gharphalia Nakachari 366B-2k-OL 624, 625, 653, 654, 659, 660, 661, Maibelia 717, 718, 729, 908,1123. Total 515B-OK-06L. 8. In response to the said notice, the petitioners raised objection by annex-ure 12 letter dated August 19, 2006, and according to the petitioners, the objection has not been dealt with as has been emphasised by the apex court in the case reported in *Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc.,* .

9. Mr. D. K. Mishra, learned senior counsel assisted by Mr. K. R. Surana, learned Counsel for the petitioners putting emphasis on the aforesaid grounds has submitted that the entire action on the part of the respondent-bank is misconceived. On being asked as to whether the petitioners are ready to repay at least the principal amount or even 50 per cent, or 25 per cent, of the same, Mr. Mishra, upon instruction from his client submits that the petitioners are not in a position to make any payment. However, he emphasised on the pleas raised in the writ petition urging for stay of the impugned notice and any proceeding thereof.

10. On the other hand, Mr. A. C. Borbora, learned senior counsel assisted by Mr. G. Singh, learned Counsel for the respondent-bank resist the writ petition on ground of being not maintainable, there being specific provision in the Act itself. As regards the objection in reference to Section 31(i) of the Act, making reference to the agreement for loan executed by and between the parties, he submits that it is the movable and immovable properties including tea bushes and factory building, which are already mortgaged and charged and hypothecated to the bank will continue to be so till the loan amount is liquidated. He disputes the claim of the petitioners that the security interest is created in agricultural land.

11. As regards the claim of the petitioners that the objection raised by it has not been dealt with, Mr. Borbora has produced the copy of the letter dated August 28, 2006, by which the objection of the petitioners as was raised against the impugned show-cause notice by annexure 12 letter dated August 19, 2006, has been dealt with and disposed of.

12. He further submits that the claim of the petitioners that the proceeding under the Act could not have been initiated simultaneously with the proceeding under the BPDR Act, 1913, is not tenable. He has also produced the copy of the letter dated June 22, 2006, issued by the bank to the Bakijai Officer conveying the decision of the board of directors of the bank to pursue its remedy under the provisions of the SARFAESI Act of 2002 and requesting the Bakijai Officer not to proceed with the proceeding pending before it. This letter has been stated to be the intimation u/s 34 of the Act.

13. I have considered the submissions made by learned Counsel for the parties and the materials available on records. There is no dispute regarding the financial assistance obtained by the petitioners from the bank. As per the notice u/s 13(2), its liability is to the tune of Rs. 1,57,87,892.64 as on May 31, 2005. The notice further indicates its liability for further interest and incidental expenses and cost, etc. The notice also clearly indicates the secured assets. On perusal of the schedules to the bank as well as the copy of the agreement dated May 24, 2002, produced by Mr. Borbora, the same do not indicate creation of any security interest in agricultural land so as to say that the provisions of the SARFAESI Act, 2002, are not applicable to the case in hand.

14. As regards the plea that two simultaneous proceedings one under the BPDR Act, 1913, and another under the SARFAESI Act, 2002, cannot proceed simultaneously, the bank has made its position clear. Although as per the provisions of Section 37 of the Act, the provisions of the SARFAESI Act and the rules framed thereunder shall be in addition to, and not in derogation of, the provisions of the other Acts and/or any other law for the time being in force and that Section 35 of the SARFAESI Act, 2002, shall have overriding effect, the bank by its aforesaid letter dated June 22, 2006, addressed to the Bakijai Officer has made known its intention not to proceed with the Bakijai proceeding. Thus, the said proceeding and any order passed thereon do not have any effect and

consequently, the appeal preferred by the petitioners against the judgment and order passed by the Bakijai Officer has also become redundant.

15. The grievance raised in reference to the case of Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc., in terms of which the objection raised in respect of the notice u/s 13(2) of the Act is to be dealt with, is also not available to the petitioners in view of the fact that the bank has already dealt with and disposed of the annexure 12 objection dated August 19, 2006, by its aforesaid letter dated August 28, 2006, which reads as follows:

The Assam Co-operative Apex Bank Ltd.

Department : Tea Loan Recovery

Ref: No. ACAB/HO/TEA Loan Recovery/Ramagro/456/06/

Date : 28-08-06. To

Managing Director M/s. Ram Agro Manufactures, Lessee : Gohainbari T.E., Seuni Ali, Opposition : Akshaya Automobiles A.T. Road : Jorhat, Pin : 785635. Sub : Notice u/s 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

Ref: Your letter dated 19-08-2006.

Dear Sir,

With reference to the above subject and your letter under reference, we offer following reply as below:

(1) That with regard to the statement made in paragraph 2 of your objection, being incorrect, the same is incorrect and disputed. Tea plantation does not fall under the agricultural land and as such invoking of provision of Section 31(i) of the SARFAESI Act, does not attract in the instant case.

(2) That with regard to the statement made in paragraphs 3 to 7 of your objection we had already intimated to Bakijai Officer, Kamrup, Metro, Guwahati vide our letter dated 22-6-06 for withdrawal of the Bakijai Case No. BPDR Case No. B-13/2005 for taking necessary action under SARFAESI Act and pending of the appeal does not bar for taking any action SARFAESI Act, and as such we offer no comments on the probable outcome/finding in the appeal which is sub-judice.

(3) That with regard to the paragraph 8 of your objection, it is not correct as the said provision under the Assam Co-operative Societies Act, is not attracted in the instant case.

(4) That with regard to paragraphs 9 and 10 of your objection, being incorrect, same is denied by us. We say that there is no illegality or infirmity in invoking the provisions under the SARFAESI Act, and as such question of withdrawal of notice is not acceptable as the same is within the parameters of law.

(5) That in respect of paragraphs 11 to 13 being incorrect, same is denied and disputed by us. It is stated that the subject notice (s) have been issued as per existing legal provisions and guidelines and there is no absurd and untenable claim as averred by you and as such we call upon you to make the payment in terms of the subject notice(s) received by us.

(6) That in respect of paragraphs 14 and 15 we offer no comments.

Yours faithfully (Sd.) General Manager (Authorised Officer) Tea Loan Recovery Deptt.

16. From the above quoted letter, it will be seen that all the grounds urged 16 by the petitioners both in the objection as well as in the writ petition have been dealt with. It has been categorically denied that the provisions of Section 31(i) of the Act debars issuance of notice u/s 13(2). Thus, the requirement to deal with the objection as envisaged u/s 13(2) of the Act and emphasized in *Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc.*, has been complied with. Be it stated here that in the said decision, the apex court has upheld the provisions of the Act.

17. The impugned notice has been issued u/s 13(2) of the Act in terms of which any borrower which 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).

18. The bank has complied with the necessary requirements of Section 13(2) of the Act. It has also dealt with the objection raised by the petitioners. Now upon failure to discharge their liability in full within the period specified in the notice, it will be open for the bank to take recourse to one or more of the measures as indicated in Section 13(4) of the Act to recover the secured debt. In the event of being dissatisfied with the action taken u/s 13(4), it will be open for the petitioners to prefer an appeal u/s 17 of the Act. This statutory remedy cannot be bypassed invoking the writ jurisdiction. Moreover, the stage has not yet ripened for initiating any proceeding. It is only at the notice stage and it will be open for the bank to take action as per the provision of the Act upon failure of the petitioners to comply with the requirement u/s 13(2) of the Act.

19. Under somewhat similar circumstances, this Court by judgment and order dated September 13, 2006, passed in *Barak Valley Tea Co. v. Union of India* [2006] 133 Comp Cas 937 (Gau) has dismissed the writ petition. In that case, the decision dated February 2, 2006, of the Madras High Court in *W.P. No. 250 of 2006 (D. Ravichandran v. Manager, Indian Overseas Bank* [2006] 132 Comp Cas 803) has also been referred to. In the decision of the Madras High Court, which has been passed placing reliance on the earlier Division Bench judgment, it has

been held that the writ petition of this nature is premature as the case as in the instant case was only at the stage of Section 13(2) notice. The said decision has also dealt with the term "agricultural land" within the meaning of Section 31(i) of the SARFAESI Act, 2002.

20. In view of the above, I am of the considered opinion that the writ petition does not disclose any materials warranting interference under Article 226 of the Constitution of India. It fails on all counts, i.e., the writ petition being premature, there being statutory remedy of appeal in case of initiation of proceeding u/s 13(4) of the Act and also on merit, in view of the own admission of the petitioner regarding its liability to the loan amount. In this connection, the observation of the apex court in Punjab National Bank v. O.C. Krishnan [2001] 107 Comp Cas 20 : AIR 2001 SCW 2993 are quoted below:

5. In our opinion, the order which was passed by the Tribunal directing sale of the mortgaged property was appealable u/s 20 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993(for short "the Act"). The High Court ought not to have exercised its jurisdiction under Article 227 in view of the provision for alternative remedy contained in the Act. We do not propose to go into the correctness of the decision of the High Court and whether the order passed by the Tribunal was correct or not has to be decided before an appropriate forum.

6. The Act has been enacted with a view to provide a special procedure for recovery of debts due to the banks and the financial institutions. There is a hierarchy of appeal provided in the Act, namely, filing of an appeal u/s 20 and this fast track procedure cannot be allowed to be derailed either by taking recourse to proceedings under Articles 226 and 227 of the Constitution or by filing a civil suit, which is expressly barred. Even though a provision under an Act cannot expressly oust the jurisdiction of the court under Articles 226 and 227 of the Constitution, nevertheless when there is an alternative remedy available judicial prudence demands that the court refrain from exercising its jurisdiction under the said constitutional provisions. This was a case where the High Court should not have entertained the petition under Article 227 of the Constitution and should have directed the respondent to take recourse to the appeal mechanism provided by the Act.

21. The writ petition is dismissed. There shall be no order as to costs.