

(2007) 05 KAR CK 0006
In the Karnataka High Court
Case No : Writ Petition No. 2 of 2007

Syndicate Bank

APPELLANT

Vs

Sri Basalingappa Hosamani

RESPONDENT

Date of Decision : 28-05-2007

Acts Referred:

Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 22 (2) (h)
Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 — Section 13, 17 (1), 17 (3)

Citation : AIR 2007 Kar 125 : (2008) 3 BC 274 : (2007) 138 CompCas 867 : (2007) ILR (Kar) 2449 : (2007) 6 KarLJ 171 : (2007) 4 KCCR 225 SN

Hon'ble Judges : Abdul Nazeer, J

Bench : Single Bench

Advocate : Prabhu and Dave, for the Appellant; V.R. Kulkarni, for R1, for the Respondent

Final Decision : Allowed

Judgement

Abdul Nazeer, J.—In this case, petitioner has challenged the order passed by the Debt Recovery Tribunal, Bangalore, ("Tribunal" for short) dated 22.12.2006 in ASA No. 35/2005 directing redelivery of possession of the property in question which was proceeded against by the petitioner through its authorised officer under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("the Act" for short).

2. Brief facts of the case are as under:

Petitioner is a nationalised bank ("Bank" for short). The head office of the Bank is situated at Manipal. The Bank has a branch at Dandeli in Uttara Kannada District. The respondent and two others had availed financial accommodation of over-draft facility from the Bank and secured the said loan by creating unregistered equitable mortgage of the land and the commercial building bearing plot Nos. 62 and 63 situated in Ward No. I-A, CMC, 200 acres layout. J.N. Road,

Dandeli, belonging to the respondent. The borrowers fell into arrears and both the loan accounts of M/s Nandi Agencies and M/s Sriram Agencies which were proprietary concerns belonging to the respondent and two others were rendered non-performance assets as on 20.8.2004. The Bank proceeded against the respondent under the provisions of Section 13 of the Act and issued notices to the respondent and other two borrowers through its authorised officer. Neither the respondent nor the other borrowers complied with the demand made in the said notices nor did they file any objections to the said notices. Thereafter, the Bank issued possession notice to the borrowers. The authorised officer of the Bank took actual possession of the secured assets on 30.11.2004 and got published the possession notice in the newspapers having wide circulation. The authorised officer of the Bank issued sale notice on 14.3.2005 proposing to sell the security. At this stage, the respondent preferred an appeal u/s 17(1) of the Act and assailed the sale notice dated 14.3.2005 and prayed for an interim order seeking stay of further proceedings pursuant to the sale notice. In the appeal, the Tribunal directed the respondent to deposit a sum of Rs. 3 lakhs and directed stay of the sale proposed by the authorised officer of the Bank. The Bank filed objections to the application as also to the appeal. On 1.12.2006, the respondent filed another interlocutory application u/s 22(2)(h) of the Recovery of Debts Due to the Banks and Financial Institutions Act, 1993 ("DRT Act" for short) seeking redelivery of the possession of the property in question pending disposal of the appeal. The reasons assigned for redelivery of possession is that the Bank had appointed a security guard to preserve and protect the property in question by paying a salary of Rs. 4,800/- per month and the said amount is likely to be debited to the loan account of the respondent and hence, possession of the property be redelivered. The Bank opposed the application by filing objections. The Tribunal allowed the said application and directed redelivery of possession of the property in favour of the respondent. The Bank has called in question the said order in this writ petition.

3. I have heard Sri K. Radhesh Prabhu, learned Counsel appearing for the Bank and Sri V.R. Kulkarni, learned Counsel for the respondent.

4. Learned Counsel for the Bank contends that the order impugned is totally without jurisdiction. It is submitted that the respondent has not made any representation to the notice u/s 13(2) of the Act dated 13.8.2004 and hence, the authorised officer of the Bank had no occasion to reply to the same. He further submits that the possession of the secured assets has been actually taken by the authorised officer of the Bank on 30.11.2004 and once possession of the secured asset is taken, the said property is vested in the authorised officer of the Bank and redelivery of possession of the property in question would not arise during the pendency of the appeal in view of specific provision contained under Sub-section (3) of Section 17 of the Act. He also submits that it is only when after examining the facts and circumstances of the case and the evidence produced by the parties, if the Tribunal comes to the conclusion that any of the measures referred to under Sub-section (4) of Section 13 of the Act taken by the secured

creditor are not in accordance with the provisions of the Act and the Rules made thereunder, then only the Tribunal can restore possession of such secured asset to the borrower. It is further contended that though detailed objection was filed by the Bank to the application, the Tribunal has not considered the same and has not passed a speaking order. It is further contended that having regard to Section 13(7) of the Act read with Rule 8(4) of the Security Interest (Enforcement) Rules, 2002 ("the Rules" for short), which are express provisions enabled the authorised officer of the Bank to engage a security personnel to guard the property in question and to recover the expenses incurred in that connection from the respondent. It is further contended that the statutory provisions incorporated in the Act and the Rules could not be diluted by the Tribunal on any ground much less on the ground that such expenses will be a burden to the respondent. Thus, the impugned order is violative of the aforesaid provisions of the Act and the Rules.

5. On the other hand, learned Counsel for the respondent has argued that the impugned order is appealable u/s 18 of the Act to the Appellate Tribunal. Therefore, the writ petition is liable to be dismissed on the ground of availability of alternative remedy. Secondly, it is contended that having regard to Sub-section (7) of Section 17 of the Act, the provisions of the DRT Act and the Rules made thereunder are made applicable. The respondent has filed the application u/s 22(2)(h) of the DRT Act, and the Tribunal has competence to consider the said application. It is further contended that having regard to Sub-section (25) of Section 19 of the DRT Act, the Tribunal was within its jurisdiction to pass the impugned order to secure the ends of justice because any amount paid to the security personnel engaged to guard the property will be an additional liability on the respondent. Therefore, he prays for dismissal of the writ petition.

6. I have carefully considered the arguments of the learned Counsel made at the bar.

7. As noticed above, the property in question belongs to the respondent herein. The respondent and two others had availed financial accommodation of over draft facilities from the Bank and secured the said loan by creating unregistered equitable mortgage of the property in question. Since the borrowers fell into arrears, the loan accounts were rendered non-performance assets as on 20.8.2004. Notice was issued u/s 13(2) of the Act to the respondent as also to the other two borrowers by the authorised officer of the Bank. The respondent as also the other two borrowers did not comply with the demand made under the said notice nor did they file any objection to the said notice. Therefore, the authorised officer of the Bank took actual possession of the secured assets on 30.11.2004 and got published possession notice in the newspapers. The authorised officer of the Bank issued sale notice on 14.3.2005 proposing to sell the security. The respondent challenged the sale notice dated 14.3.2005 before the Tribunal u/s 17(1) of the Act. The appeal was filed on 7.4.2005. An application for interim order seeking stay of further proceedings pursuant to the

sale notice was also filed by the respondent. The Tribunal directed the respondent to deposit a sum of Rs. 3 lakhs and directed stay of sale proposed by the authorised officer of the Bank. Thereafter, the respondent filed another application as per Annexure "H" seeking re-delivery of the property pending disposal of the appeal. The grounds urged in the application is that the respondent has given an offer for one time settlement as suggested by the manager of the Bank. It has been further contended that the Bank has appointed a guard for security of the assets by paying monthly salary of Rs. 4,800/-. The monthly salary at a small place like Dandeli is very high and the Bank is debiting these expenses to the loan account, which is again a burden on him. The Bank has filed its detailed objections as per Annexure "J". The Tribunal has passed an order on 22.12.2006 directing redelivery of secured assets to the respondent till the disposal of the appeal. It is clear from the impugned order that the Tribunal has not considered the objections filed by the Bank. The impugned order was passed only on the basis of the contentions urged in the application filed by the respondent.

8. Let me first deal with the submission of the learned Counsel for the respondent with regard to the availability of alternative remedy. It is true that the order impugned is appealable u/s 18 of the Act. As noticed above, the Bank has filed its detailed objections to the application seeking redelivery of the property in question. The Tribunal has not considered any of the objections filed by the Bank opposing the interim relief. The order is not even a speaking order. Rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In appropriate cases, inspite of availability of alternative remedy, High Court may still exercise its writ jurisdiction. In my view, the Tribunal ought to have passed a speaking order after considering the objections filed by the Bank. The absence of reasons has rendered the impugned order not sustainable in law. The desirability of passing a speaking order cannot be lightly ignored by any judicial or quasi-judicial authority, more so, when the same is amenable to further challenge. The requirement of indicating reasons in such cases has been judicially recognised as imperative. Reason is the heart beat of every conclusion and without the same, it become lifeless. The Apex Court in the case of *Union of India and Ors. v. Jai Prakash Singh and Anr.* 2007 AIR SCW 1692 has held as under:

Reasons introduce clarity in an order. On plainest consideration of justice, the High Court ought to have set forth its reasons, however brief, in its order indicative of an application of its mind, all the more when its order is amenable to further avenue of challenge. The absence of reasons has rendered the High Court's judgment not sustainable.

9. The Apex Court in the case of *Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others*, , has held as under:

The rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of

availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (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.

(emphasis supplied)

10. This case does not involve any disputed questions of fact. The only question is whether the Tribunal has jurisdiction to pass the impugned order? The impugned order is wholly without jurisdiction, which is clear from the succeeding paragraphs. Therefore, I am of the view that writ petition cannot be dismissed on the ground of availability of alternative remedy.

11. Now let me consider as to whether the Tribunal has jurisdiction to direct the Bank to redeliver possession of the property in question to the respondent during the pendency of the appeal?

12. Sub-section (4) of Section 13 of the Act states that 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 measures enumerated in the said section to recover his secured debt.

13. Section 17 of the Act provides an opportunity to any person aggrieved by any of the measures referred to in Sub-section (4) of Section 13 of the Act taken by the secured creditor or his authorised officer. The Apex Court in the case of *Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc.*, has held that the proceedings u/s 17 of the Act are not appellate proceedings. It is an initial action, which is brought before the forum as prescribed under the Act raising grievance against the action or measures taken by one of the parties to the contract. It is the stage of initial proceedings like filing a suit in Civil Court. The proceedings u/s 17 of the Act are in lieu of a civil suit which remedy is ordinarily available but for the bar u/s 34 of the Act.

14. Sub-section (3) of Section 17 of the Act is relevant for the purpose of this case, which is as under:

(3) If the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in Sub-section (4) of Section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management of the secured assets to the borrower or restoration of possession of the secured assets to the borrower, it may by order, declare the recourse to any one or more measures referred to in Sub-section (4) of Section 13 taken by the secured creditor as invalid and restore the possession of the secured assets to the borrower or restore the management of the secured assets to the borrower, as the case may be, and pass such order as it may consider appropriate and

necessary in relation to any of the recourse taken by the secured creditor under Sub-section (4) of Section 13.

15. It is clear from the aforesaid provision that once possession of the secured asset is taken, delivering back possession during the pendency of the appeal does not arise. It is only when after examining the facts and circumstances of the case and the evidence produced by the parties, if the Tribunal comes to the conclusion that any of the measures referred to in Sub-section (4) of Section 13 of the Act taken by the secured creditor are not in accordance with the provisions of the Act and the rules made thereunder, then only the Tribunal can restore the possession of such secured asset to the borrower.

16. Learned Counsel for the respondent would contend that having regard to Sub-section (7) of Section 17 of the Act, he had made an application for redelivery of the possession of the property in question pending disposal of the appeal before the Tribunal. Sub-section (7) of Section 17 of the Act is as under:

(7) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and the rules made thereunder.

17. In order to give a proper construction to the above provision, the object of the Act has to be kept in mind. While considering the validity of the Act, the Hon"ble Supreme Court in *Mardia Chemical's Case* (supra) has discussed in detail the object of the Act. It has been observed that considering the fact that there was a blockade of large sums of amount of the financial institutions creating circumstances which retard the economic progress followed by a large number of other consequential ill-effects, the DRT Act was brought into force, which did not bring the desired results. It was felt that in the present day global economy, it may be difficult to stick to old and conventional method of financing and recovery of dues. Therefore, the Act was brought into force with a view to evolve means for faster recovery of the debts.

18. The expression "as far as may be" employed in the said provision assumes importance. The said expression means in deciding any question relating to procedure not specifically provided in the Act, the Tribunal as far as may be guided by the provisions of DRT Act and the Rules made thereunder. This does not in any way override the special provisions contained in the Act. In other words, if there is no specific provision in the Act, then only the provisions of the DRT Act and the Rules made thereunder are applicable. This will also help in faster recovery of the debts which is the main object of the Act. Therefore, having regard to the specific provision in Sub-section (3) of Section 17 of the Act, question of invoking the general provision contained in DRT Act is not permissible. The argument of the learned Counsel for the respondent that the order of the Tribunal should be referable to Sub-section (25) of Section 19 of the DRT Act read with Sub-section (2)(h) of Section 22 of the DRT Act is hereby

rejected.

19. It is no doubt true that the Bank has engaged a security personnel to guard the property in question and it is paying charges for the same. Rule 8(4) of the Rules enables the authorised officer of the Bank to engage a security personnel to guard the secured assets till they are sold or otherwise disposed of. Rule 8(4) of the Rules is relevant for the purpose of this case. It is as under:

(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.

Similarly, Section 13(7) of the Act permits the Bank to recover the expenses properly incurred from the borrower. The expenses incurred for preservation and protection of secured asset cannot be termed as improper expenses. Therefore, the action of the Bank in engaging a security personnel to guard the secured asset is perfectly in accordance with law.

20. It is to be noted here that the application u/s 17(1) of the Act was filed by the respondent before the Tribunal on 07.04.2005. Materials placed on record clearly show that the Tribunal has not made any efforts to dispose of the main matter as required u/s 17(5) of the Act. This Court has not granted interim stay of further proceedings before the Tribunal. Section 17(5) of the Act is as under:

17(5) Any application made under Sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application:

Provided that the Debts Recovery Tribunal may, from time to time, extend the said period for reasons to be recorded in writing, so, however, that the total period of pendency of the application with the Debts Recovery Tribunal, shall not exceed four months from the date of making of such application made under Sub-section (1).

It is clear from the aforesaid provision that the application filed under Sub-section (1) of Section 17 of the Act has to be disposed of within sixty days from the date of such application. However, the Tribunal may from time to time extend the said period for reasons to be recorded in writing. However, the total period of pendency of the application with the Tribunal shall not exceed four months from the date of making such application. The aforesaid provision is in conformity with the main object of the Act i.e. speedy recovery of the debt. In the present case the Tribunal has failed to comply with the above provision.

21. Having given my anxious consideration to the arguments of the learned Counsel made at the bar, I am of the view that the Tribunal was not justified in allowing the application of the respondent directing redelivery of the possession of the property in question pending disposal of the appeal. In the result, writ petition succeeds and it is accordingly allowed. The order passed by the Tribunal dated 22.12.2006 (Annexure "A") is hereby quashed.

I direct the Tribunal to dispose of the main matter on its merits and in accordance with law within two months from the date of receipt of copy of this order. No costs.