

(2013) 07 PAT CK 0099

In the Patna High Court

Case No : LPA No. 1743 of 2012 in CWJC No. 8746 of 2012

The State Bank of India

APPELLANT

Vs

M/s. Pumea Cold Storage and Another

RESPONDENT

Date of Decision : 31-07-2013

Acts Referred:

Constitution of India, 1950 — Article 226
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 19
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 13(10), 13(2), 13(3A), 17

Citation : (2013) 4 PLJR 753

Hon'ble Judges : Rekha Manharlal Doshit, C.J;Ashwani Kr. Singh, J

Bench : Division Bench

Advocate : Vinod Kumar Kanth, Sanjiv Kumar and Anjani Kumar Mishra, for the Appellant; Arbind Kumar Jha, for the Respondent

Judgement

Rekha Manharlal Doshit, C.J.—This Appeal under Clause 10 of the Letters Patent is preferred by the respondent State Bank of India (hereinafter referred to as "the Bank") against the order dated 27th August, 2012 made by the learned single Judge in C.W.J.C. No. 8746 of 2012. The respondent M/s. Purnea Cold Storage (hereinafter referred to as "the Petitioner/writ Petitioner"), a proprietary firm, approached this Court through its proprietor Amar Nath Tiwari under Article 226 of the Constitution in above C.W.J.C. No. 8746 of 2012.

2. With the financial assistance of the State Bank of India, the predecessor of the petitioner had set-up a cold storage and ice factory as early as in 1972. In 1992, the credit facility was enhanced. Over the years, the petitioner claims to have repaid the original and the loan received in 1992. The petitioner availed of further financial assistance for expansion of his business in 1998. In 2005, a huge loan was borrowed by the petitioner for modernization of the plant and machinery. In 2008, the Bank advanced the credit facility to the extent of Rs. 4,94,40,000.00. The petitioner offered certain land in security. It is not in dispute that the petitioner is a debtor in default. A huge sum is outstanding against the

petitioner. Ultimately, on 20th December, 2009, the petitioner was classified as NPA (Non-Performing Asset).

3. The Bank, with a view to recovering its money, resorted to the remedy under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "the Act of 2002"). Though the land offered in security was put up for public auction, no buyer came forth. The attempt of the Bank to realise its outstanding dues by resorting to the remedy under the Act of 2002, thus, failed. The Bank, therefore, approached the Debts Recovery Tribunal, Patna (hereinafter referred to as "the Tribunal") constituted under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as "the Act of 1993") for recovery of its dues u/s 19 of the Act of 1993 in Original Application No. 83 of 2011.

4. We may note here that feeling aggrieved by the notice of demand dated 18th August, 2010 issued by the Bank u/s 13(2) of the Act of 2002, the petitioner approached this Court under Article 226 of the Constitution in C.W.J.C. No. 15909 of 2010. The said petition came to be dismissed (Coram : R.K. Datta, J.) on 16th November, 2010. The Bank proceeded further u/s 13 of the Act of 2002 to give notice for public auction of the secured assets. Feeling aggrieved, the petitioner again approached this Court under Article 226 of the Constitution in C.W.J.C. No. 3581 of 2011. The said petition was permitted to be withdrawn (Coram : S.N. Hussain, J.) on 25th February, 2011 with liberty to the petitioner to pursue the remedy available under the law; Pursuant to the said order, the petitioner approached the Tribunal u/s 17 of the Act of 2002 in S.A. No. 81 of 2011. The said Application was disposed of by the Tribunal on 18th January, 2012 with a direction to the petitioner to file representation against the notice issued u/s 13(2) of the Act of 2002. Pursuant to the said direction, the petitioner lodged its objections against the notice u/s 13(2) of the Act as envisaged by Section 13(3-A) of the Act of 2002. The said objections were considered by the Bank and were rejected on 18th February, 2012.

5. Feeling aggrieved, the petitioner approached this Court under Article 226 of the Constitution in above C.W.J.C. No. 8746 of 2012 to challenge the above referred order dated 18th January, 2012 made by the Tribunal and the decision dated 18th February, 2012 of the Bank on the objections filed by the petitioner.

6. According to the petitioner, the Bank having resorted to the remedy available under the Act of 2002, the Bank is debarred from approaching the Tribunal for recovery of its dues until remedy under the Act of 2002 is completely exhausted. The Bank contested the writ petition.

7. The learned single Judge has allowed the writ petition. The learned single Judge has accepted that both, the Act of 1993 and the Act of 2002 are complementary to each other and that the Act of 2002 has been enacted with a view to providing remedy to the secured creditors and financial institutions in addition to the remedy of recovery before the Tribunal. The learned single Judge

has also held that the remedy of enforcement of the security interest under the Act of 2002 and the Act of 1993 are complementary to each other and there is no inherent or implied inconsistency between the remedies under the two Acts. The doctrine of election, therefore, had no application. Nevertheless, the learned single Judge has held that the provisions contained in the Act of 2002 have an overriding effect over the other laws. Until the remedy u/s 13 of the Act of 2002 is completely availed of, the Bank or the financial institution is debarred from approaching the Tribunal. In the opinion of the learned single Judge, if the sale proceeds of the secured assets are not sufficient to satisfy the Bank's dues, the Bank would be entitled to institute recovery proceedings before the Tribunal. In the present case, the Bank having not liquidated the secured assets, the Bank without exhausting the remedy under the Act of 2002 could not have lodged recovery proceeding before the Tribunal. The action of the Bank in lodging recovery proceedings before the Tribunal u/s 19 of the Act of 1993 is without jurisdiction and beyond the authority of law. Consequently, the learned single Judge has restrained the Bank from proceeding further with the Original Application No. 83 of 2011 pending before the Tribunal.

8. Feeling aggrieved, the Bank has preferred this Appeal.

9. Learned counsel Mr. Vinod Kumar Kanth has appeared for the Bank. He has assailed the judgment of the learned single Judge. He has submitted that the Act of 1993 and the Act of 2002 are two complementary enactments. Act of 1993 was enacted especially for expediting claims of the banks and the financial institutions against the defaulting borrowers. The Act of 2002 was enacted to enable the banks and the financial institutions to realise its dues from the sale proceeds of the secured assets. In other words, the banks and the financial institutions taking recourse to the Act of 2002 do not have to wait for a decree by a Civil Court or an order by the Tribunal to recover its dues by sale of the secured assets of the defaulting borrower. That is the view expressed by the Hon'ble Supreme Court time and again and as late as in the matter of Transcore Vs. Union of India (UOI) and Another, He has submitted that the aforesaid judgment in the matter of M/s. Transcore has been followed by a Division Bench of the Delhi High Court in the matter of Mayur Coirs Pvt. Ltd. & Ors. v. Development Credit Bank Ltd. [(W.P. (C) 191/2008 decided on 11th April, 2008, Coram: Mr. Justice T.S. Thakur, as he then was and Ms. Justice Aruna Suresh]. He has submitted that in the matter of M/s. Transcore, the Hon'ble Supreme Court has categorically held that a bank or a financial institution having approached the Debts Recovery Tribunal, may avail of the remedy under the Act of 2002. The same principle has been applied by the Delhi High Court. The Court has held, "Equally untenable is the second submission made by Mr. Choudhary that the pendency of proceedings under the Securitisation Act would debar the bank from instituting proceedings for recovery of the debt by obtaining a decree from the DRT under the RDBFI Act. There is no gainsaying that both the enactments are intended to ensure speedy recovery of the outstanding debts due to banks and financial institutions. There is nothing in either the provisions of the

Securitization Act or in the RDDBFI Act to suggest that invocation of one would forbid the invocation of the provisions contained in the other. That position has been, in our opinion, sufficiently explained by the Supreme Court in Transcore's case (supra) where the issue was whether the bank could, without withdrawing the proceedings instituted before the DRT, take resort to the Securitisation Act. Answering the question in the negative, the Court held that withdrawal of the OA before the DRT was not a condition precedent for invoking the Securitisation Act. We see no reason why the converse also cannot be true. If Securitisation proceedings are permissible during the pendency of the recovery proceedings under the RDDBFI Act, there is no reason why the recovery proceedings would become legally bad just because the bank had taken resort to Securitisation Act. What is important is that both the proceedings can be instituted and maintained simultaneously. If that be so, just because the proceedings under the Securitisation Act had been instituted earlier would not render the proceedings before the DRT bad. The Appellate Tribunal was, in our opinion, perfectly justified in holding that the scheme of the two enactments did not debar simultaneous resort to the provisions thereof. The fact that there is a period of limitation prescribed for filing of the suits before the DRT also makes it necessary for the banks and financial institutions to institute such suits within the period of limitation stipulated for the same. Any delay in doing so would jeopardize the maintainability of such suits which no banking institution can afford to risk especially where the amounts outstanding against the borrowers are huge. In that view, the application made by the petitioners was an effort to somehow delay the proceedings in the OA pending before the Tribunal."

10. Mr. Vinod Kumar Kanth has further submitted that the Bank did avail of the remedy under the Act of 2002 and made an attempt to realise its dues or part of it by sale of the secured asset, the land. The Bank, however, failed to realise a farthing from such sale as no party came forward to purchase the secured asset. He has submitted that the remedies under both the Acts being complementary to each other, the Bank cannot be debarred from realizing its dues by approaching the Tribunal.

11. Learned advocate Mr. Arbind Kumar Jha has appeared for the petitioner. He has opposed the Appeal. He has submitted that the very scheme under the Act of 2002 envisages that having resorted to the remedy under the Act of 2002, until the said remedy is exhausted the Bank is debarred from availing of the remedy before the Tribunal under the Act of 1993. He has submitted that the endeavour of the Bank is to save the limitation. The same being contrary to the statutory provisions cannot be permitted. He has relied upon Section 13(10) of the Act of 2002 and Rule 11 of the Security interest (Enforcement) Rules, 2002 to submit that once the remedy u/s 13 of the Act of 2002 is availed of, until it is taken to its logical end no further remedy can be availed of. He has submitted that Section 13(10) of the Act of 2002 clearly postulates that only in case the secured creditor is not fully satisfied with the sale proceeds of the secured assets, the secured creditor cannot approach the Debts Recovery Tribunal except for

remainder of the outstanding dues. He has heavily relied upon Section 35 of the Act of 2002. He has submitted that the non-obstante clause in Section 35 of the Act of 2002 gives the Act of 2002 an overriding effect upon the Act of 1993. Therefore, until the remedy under the Act of 2002 is exhausted, the secured creditor is debarred from approaching the Tribunal for recovery of its dues.

12. We are of the opinion that the learned single Judge has rightly held that both the Acts are complementary to each other and that there is no inherent or implied inconsistency between the remedies under the two Acts. However, having held that both remedies are complementary to each other and there was no inherent or implied inconsistency in either of the enactments, the learned single Judge has erred in holding that the provisions contained in the Act of 2002 has an overriding effect over the Act of 1993. Once the Act of 2002 is invoked, the remedy under the Act of 1993 cannot be availed of except for the remainder of the dues which cannot be satisfied by sale of the secured assets.

13. Section 35 of the Act of 2002 does give the Act of 2002 an overriding effect over any other law notwithstanding anything inconsistent contained in such other law. In other words, the Act of 2002 would have overriding effect over the provisions contained in the Act of 1993, had the provisions contained in the Act of 1993 been inconsistent with the provisions contained in the Act of 2002. It is by now well settled and accepted universally that the Act of 2002 is complementary to the Act of 1993 and has been enacted with a view to providing a speedier remedy to the secured creditors. Having held that there was no inherent or implied inconsistency between the two enactments, the learned single Judge has erred in invoking Section 35 of the Act of 2002 to stay the proceeding before the Tribunal. We also agree with the Delhi High Court that there is no embargo in either of the Acts restraining the secured creditor from pursuing both the remedies simultaneously or one after the other. The reading of such an embargo would frustrate the very soul and very purpose of both the enactments.

14. There is nothing wrong about the Bank in approaching the Tribunal within the period of limitation. No ulterior motive can be imputed against the Bank for approaching the Tribunal within the period of limitation as suggested by Mr. Arbind Kumar Jha. On the contrary, we believe that it is the endeavour of the petitioner to thwart every action of the Bank in realizing its outstanding dues. The petitioner has challenged every stage of action before this Court or before the Tribunal. The intention to delay the proceeding is writ large in the conduct of the petitioner.

15. We can view this matter the other way also. Sub-section (10) of Section 13 of the Act of 2002 does enable a secured creditor to realise remainder of its dues before the Debts Recovery Tribunal in case the sale proceeds of the secured assets are not sufficient to satisfy the debt. In the present case, the secured asset could not be sold at all. Hence, the entire debt remained outstanding even after having taken recourse to the Act of 2002. The Bank, therefore, had the

remedy of recovery before the Tribunal as envisaged by Section 13(10) of the Act of 2002.

16. We have also noticed that although the petitioner had been before this Court earlier in the above referred C.W.J.C. No. 15909 of 2010 which came to be dismissed and C.W.J.C. No. 3581 of 2011 which came to be withdrawn by the writ petitioner, in the present proceeding the writ petitioner has taken due care not to mention the factum of the above referred two writ petitions and the orders made thereon. When confronted, Mr. Arbind Kumar Jha had the audacity to submit that the present proceeding raises pure questions of law and the earlier writ petitions or the decision thereon are not relevant. We believe, whether relevant or not those two petitions having been filed in the same subject matter i.e. the recovery of the outstanding dues of the Bank, it was absolutely necessary for the petitioner to state the complete facts before the Court. The writ petitioner, in our opinion, is guilty of suppressio veri. For the aforesaid reasons, we allow this Appeal. The impugned order dated 27th August, 2012 made by the learned single Judge in C.W.J.C. No. 8746 of 2012 is set aside. C.W.J.C. No. 8746 of 2012 is dismissed with cost.

Cost is quantified at Rs. 50,000/-.

Ashwani Kumar Singh, J.

I agree.