(2011) 03 DEL CK 0537

In the Delhi High Court

Case No : Letters Patent Appeal No. 814 of 2010

Triton Corporation Limited — APPELLANT

Vs

Karnataka Bank Limited — RESPONDENT

Date of Decision : 30-03-2011

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Registration Act, 1908 — Section 17
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(2), 13(3), 13(3A), 13(4), 14
Transfer of Property Act, 1882 — Section 58

Citation : (2011) 03 DEL CK 0537

Hon'ble Judges : Dipak Misra, C.J;Sanjiv Khanna, J

Bench : Division Bench

Advocate : Chander Prakash, for the Appellant; V. Sudeer, for the Respondent

Final Decision : Dismissed

Judgement

Sanjiv Khanna, J.—In the present Intra Court Appeal, the challenge is to the order dated 14th September, 2010, dismissing the Writ Petition (Civil) No. 6206/2010, filed by the Appellant M/s Triton Corporation Limited, against the Respondent M/s Karnataka Bank Limited.

2. The prayers made in the intra-Court appeal read as under:

a) Expunge the remarks/observation of the Ld. Single Judge made on merits of the matter in the impugned order dated 14.9.2010 passed in W.P. (C) No. 6206 of 2010;

b) Direct the Ld. Debt Recovery Tribunal, New Delhi to hear the appeal without being influenced by the observation of the Ld. Single Judge made in the order dated 14.9.2010;

c) Pass such order or orders as this Hon''ble Court may deem fit and proper in the interest of justice.

3. The Appellant has, however, has filed an additional affidavit dated 6th January, 2011 in which the Appellant has made the following prayers:

a. Allow this appeal and after quashing the judgment and order dated 14.09.2010 recorded by the Hon''ble Single Judge of this Hon''ble Court in W.P. (C) No. 6206 of 2010, be pleased to adjudge that the Respondent bank is not competent and lacks jurisdiction under the NPA Act to proceed with any recovery measures u/s 13(4) of the Act;

b. Furthermore, all acts and commissions, including the notice u/s 13(2) and the symbolic possession u/s 13(4), thus far taken and pressed be quashed and set aside as without jurisdiction and illegal.

c. Furthermore, be pleased to stay, as an interim measure, all further proceedings by the Respondent bank against the Appellant company and the subject property; And be further pleased to pass such other Order as this Hon''ble Court may deem expedient and proper in the interest of justice.

ALTERNATIVELY and in the event of the expression of view on the various aspects referred to above by the Hon''ble Single Judge, in his Order dated 14.09.2010, being found to be simply in the nature of simple observations, the relief, herein below, is prayed for- Expunge the observations of the Hon''ble Single Judge made on the merits of the matter by his Order dated 14.09.2010.

It is therefore most respectfully preyed that the aforementioned facts may be kindly taken on records and be considered during arguments.

4. The Respondent bank has initiated proceedings u/s 13(2) and 13(3) of the Securitization & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 (SARFAESI Act, for short). The Appellant had challenged the notice dated 19th March, 2010 under Sections 13(2) and 13(3) of the SARFAESI Act, in respect of the secured asset, property No. 113, Udyog Vihar Phase I, Gurgaon, Haryana.

5. The contentions raised by the Appellant before the learned single Judge and before us are:

(i) Respondent bank is not a secured creditor and, therefore, the provisions of SARFAESI Act are not applicable.

(ii) The Respondent bank has not classified the Appellant''s account with them as a non-performing asset in accordance with the mandate of law and particularly SARFAESI Act and, therefore, there is lack of jurisdiction and the proceedings in the SARFAESI Act are void for want of jurisdiction.

(iii) The notice dated 19th March, 2010 u/s 13(2)/13(3) is defective as necessary details of the amount demanded have not been placed on record.

(iv) The Respondent bank failed to comply with the mandate as contained in Section 13(3)(a) of the SARFAESI Act as it failed to furnish requisite details and the reply given by the Respondent bank was evasive.

6. It is clear from the aforesaid facts stated above that the Appellant has been oscillating and vacillating. Before the learned single Judge, the Appellant had pressed the writ petition and, therefore, the contentions raised were examined on merits and answered against the Appellant in the impugned judgment dated 14th September, 2010. Thereafter, the Appellant filed an appeal and in the appeal the only prayer made was to expunge the remarks and observations of the learned single Judge and in this connection reliance was placed on Tin Plate Co. of India Ltd. Vs. State of Bihar and Others, . It is stated in the grounds of appeal that as the writ petition was dismissed on the ground of alternative forum, learned single Judge should not have expressed his opinion on the merits of the pleas raised. At the same time, in the additional affidavit the Appellant wants the appellate court to examine the merits and in the alternative it is submitted that the observations of the learned single Judge on merits should be expunged. The Appellant wants to sail in two different boats and, therefore, should be ready for the consequences when a matter is decided. Reasons have to be given by the Court for their decision. The Appellant cannot insist that the Court should decide the appeal on merits at the same time not make observations or give findings.

7. The first contention of the Appellant is based on the contention that there was no equitable mortgage by deposit of title deed, but the mortgage was as a result of the document dated 25th July, 2007 written by the Respondent bank in response to the proposal given by the Appellant for finance facilities. Learned single Judge in this regard has held that the letter was a mere precursor and did not create mortgage. We have also examined the letter and the judgments relied upon by the counsel for the parties, viz., Rachpal Mahraj Vs. Bhagwandas Daruka and Others, and United Bank of India Ltd. Vs. Lekharam Sonaram and Co. and Others, . It has been held by the Supreme Court that Section 58(f) of the Transfer of Property Act, 1882 permits mortgage by deposit of title deeds and in such cases there is no requirement for registration under the Registration Act, 1908. However, if parties choose to reduce the contract in writing, then the document will be the sole evidence of terms and should be registered u/s 17 of the Indian Registration Act, 1908. The contention of the Respondent bank is that the letter dated 27th July, 2007 is merely a precursor and did not create any mortgage and at best it can be regarded as an agreement that in future, the parties would enter into an equitable mortgage. It will not be appropriate and proper for the writ court to go into the said aspects while exercising writ jurisdiction under Article 226 of the Constitution of India. This is a matter which can be gone into and examined u/s 14 of the SARFAESI Act. Ordinarily, a writ petition under Article 226 of the Constitution is not entertained if an effective remedy is available to an aggrieved person. This principle applies with greater vigour in matters relating to recovery of taxes, cess, fees and dues of the banks and financial institutions. The contention raised and the reply given by the Respondent bank clearly shows that this is not a fit case which falls under one of

the exceptions carved out in the cases of Baburam Prakash Chandra Maheshwari Vs. Antarim Zila Parishad now Zila Parishad, Muzaffarnagar, , Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, and Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others, and some other judgments.

8. The exceptions pointed out in the aforesaid cases are when there is inherent lack of jurisdiction or vires of enactment is challenged, principles of natural justice are violated and where the writ Petitioner seeks enforcement of fundamental rights. None of the exceptions are applicable to the facts of the present case. It is not possible to accept that the contentions raised by the Appellant relate to inherent lack of jurisdiction. The aforesaid contention fails to notice the distinction between a "jurisdictional fact" and an "adjudicatory fact". A jurisdictional fact is a primary fact and is a condition precedent for exercise of jurisdiction by a particular authority under the statute. It relates to existence of pre-conditions before a court, tribunal or authority can exercise jurisdiction. "Adjudicatory facts" cannot be equated with "jurisdictional facts". They relate to exercise of jurisdiction on merits. Error or a mistake on "adjudicatory fact" can make the decision vulnerable to challenge on the ground of error in exercise of jurisdiction but it is not an error of lack of jurisdiction. The aforesaid distinction has been clearly brought out in the case of Ramesh Chandra Sankla Etc. Vs. Vikram Cement Etc., . It has been observed:

68. A "jurisdictional fact" is one on the existence of which depends the jurisdiction of a court, tribunal or an authority. If the jurisdictional fact does not exist, the court or tribunal cannot act. If an inferior court or tribunal wrongly assumes the existence of such fact, a writ of certiorari lies. The underlying principle is that by erroneously assuming existence of jurisdictional fact, a subordinate court or an inferior tribunal cannot confer upon itself jurisdiction which it otherwise does not possess.

69. The counsel referred to a recent decision of this Court in Arun Kumar v. Union of India. Speaking for the Court, one of us (C.K. Thakker, J.) observed:

74. A "jurisdictional fact" is a fact which must exist before a court, tribunal or an authority assumes jurisdiction over a particular matter. A jurisdictional fact is one on existence or non-existence of which depends jurisdiction of a court, a tribunal or an authority. It is the fact upon which an administrative agency''s power to act depends. If the jurisdictional fact does not exist, the court, authority or officer cannot act. If a court or authority wrongly assumes the existence of such fact, the order can be questioned by a writ of certiorari. The underlying principle is that by erroneously assuming existence of such jurisdictional fact, no authority can confer upon itself jurisdiction which it otherwise does not possess.

It was further observed:

76. The existence of jurisdictional fact is thus sine qua non or condition precedent for the exercise of power by a court of limited jurisdiction.

70. Drawing the distinction between "jurisdictional fact" and "adjudicatory fact", the Court stated: (Arun Kumar case)

84. ... it is clear that existence of "jurisdictional fact" is sine qua non for the exercise of power. If the jurisdictional fact exists, the authority can proceed with the case and take an appropriate decision in accordance with law. Once the authority has jurisdiction in the matter on existence of "jurisdictional fact", it can decide the "fact in issue" or "adjudicatory fact". A wrong decision on "fact in issue" or on "adjudicatory fact" would not make the decision of the authority without jurisdiction or vulnerable provided essential or fundamental fact as to existence of jurisdiction is present.

The principle was reiterated in Carona Ltd. v. Parvathy Swaminathan & Sons.

9. The contention No. (i) of the Appellant mentioned in paragraph 5 has been discussed above. Contention Nos. (ii) to (iv) mentioned in paragraph 5 in the present case cannot be classified as jurisdictional but fall in the category of adjudicatory facts. These relate to the merits. These contentions have been specifically dealt with and rejected by the learned single Judge in the impugned order dated 14th September, 2010. Merits of these contentions can be examined in accordance with the procedure and the provisions under the SARFAESI Act, which have been discussed below. Further, tribunal or an authority of limited jurisdiction can be given power and authority to determine existence of conditions precedent or existence of a particular fact on which its jurisdiction at the inception depends and the tribunal is entitled to make up its mind and decide the said question.

10. As far as the provisions of SARFAESI Act are concerned, two decisions of the Supreme Court in Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc., and Transcore Vs. Union of India (UOI) and Another, are apposite. The provisions of SARFAESI Act have been examined threadbare and have been interpreted. After the decision in Mardia Chemicals (supra), Section 13(3-A) was inserted in the SARFAESI Act. The said Section provides for a last opportunity to the borrower to make a representation to the secured creditor against classification of his account as a non-performing asset. The secured creditor is required to consider the representation and if the secured creditor comes to the conclusion that the representation does not merit acceptance and should be rejected, then within a week of the receipt of the communication, the reasons for rejecting the same have to be communicated. 11. Section 13(4) of the SARFAESI Act postulates the remedies available to a secured creditor when the borrower fails to discharge his liability within the periods specified u/s 13(2). Section 14 of the SARFAESI Act provides that the secured creditor can file an application before the Chief Metropolitan Magistrate or the District Magistrate having jurisdiction and the said authority is then obliged to proceed (see United Bank of India Vs. Satyawati Tondon and Others,). A secured creditor in order to enforce his right u/s 13(4) and in particular Section 13(4) Sub-section (a) is to take recourse to Section 14 of SARFAESI Act. Section 17 of the SARFAESI Act provides

for an appeal to a Debt Recovery Tribunal. In view of the said provisions, in Authorized Officer, Indian Overseas Bank and Another Vs. Ashok Saw Mill, , it has been held in paragraphs 35, 36 and 39 as under:

35. In order to prevent misuse of such wide powers and to prevent prejudice being caused to a borrower on account of an error on the part of the banks or financial institutions, certain checks and balances have been introduced in Section 17 which allow any person, including the borrower, aggrieved by any of the measures referred to in Sub-section (4) of Section 13 taken by the secured creditor, to make an application to the DRT having jurisdiction in the matter within 45 days from the date of such measures having taken for the reliefs indicated in Sub-section (3) thereof.

36. The intention of the legislature is, therefore, clear that while the banks and financial institutions have been vested with stringent powers for recovery of their dues, safeguards have also been provided for rectifying any error or wrongful use of such powers by vesting the DRT with authority after conducting an adjudication into the matter to declare any such action invalid and also to restore possession even though possession may have been made over to the transferee.

37. XXXXX

38. XXXXX

39. We are unable to agree with or accept the submissions made on behalf of the Appellants that the DRT had no jurisdiction to interfere with the action taken by the secured creditor after the stage contemplated u/s 13(4) of the Act. On the other hand, the law is otherwise and it contemplates that the action taken by a secured creditor in terms of Section 13(4) is open to scrutiny and cannot only be set aside but even the status quo ante can be restored by the DRT.

12. In United Bank of India (supra), the Appellant bank had challenged the interim order and the interdiction to the proceedings under the SARFAESI Act. The Supreme Court set aside the interim order and held that the writ petition should not have been entertained. It has been observed:

42. There is another reason why the impugned order should be set aside. If Respondent 1 had any tangible grievance against the notice issued u/s 13(4) or action taken u/s 14, then she could have availed remedy by filing an application u/s 17(1). The expression "any person" used in Section 17(1) is of wide import. It takes within its fold, not only the borrower but also the guarantor or any other person who may be affected by the action taken u/s 13(4) or Section 14. Both, the Tribunal and the Appellate Tribunal are empowered to pass interim orders under Sections 17 and 18 and are required to decide the matters within a fixed time schedule. It is thus evident that the remedies available to an aggrieved person under the SARFAESI Act are both expeditious and effective.

43. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an

effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc. the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are a code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, the High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.

44. While expressing the aforesaid view, we are conscious that the powers conferred upon the High Court under Article 226 of the Constitution to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power under Article 226 of the Constitution.

45. It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226 of the Constitution and pass interim order ignoring the fact that the Petitioner can avail effective alternative remedy by filing application, appeal, revision, etc. and the particular legislation contains a detailed mechanism for redressal of his grievance.

46. It must be remembered that stay of an action initiated by the State and/or its agencies/instrumentalities for recovery of taxes, cess, fees, etc. seriously impedes execution of projects of public importance and disables them from discharging their constitutional and legal obligations towards the citizens. In cases relating to recovery of the dues of banks, financial institutions and secured creditors, stay granted by the High Court would have serious adverse impact on the financial health of such bodies/institutions, which (sic will) ultimately prove detrimental to the economy of the nation. Therefore, the High Court should be extremely careful and circumspect in exercising its discretion to grant stay in such matters. Of course, if the Petitioner is able to show that its case falls within any of the exceptions carved out in Baburam Prakash Chandra Maheshwari v. Antarim Zila Parishad, Whirlpool Corpn. v. Registrar of Trade Marks and Harbanslal Sahnia v. Indian Oil Corpn. Ltd. and some other judgments, then the High Court may, after considering all the relevant parameters and public interest, pass an appropriate interim order.

13. Several judgments of the Supreme Court on the question of alternative

remedy and when it is desirable not to exercise discretionary jurisdiction under Article 226 of the Constitution have been highlighted.

14. Recently, again the Supreme Court in Kanaiyalal Lalchand Sachdev and Others Vs. State of Maharashtra and Others, had the occasion to examine the provisions of SARFAESI Act and whether in spite of alternative remedy, a writ court should interfere. It was opined as under:

22. We are in respectful agreement with the above enunciation of law on the point. It is manifest that an action u/s 14 of the Act constitutes an action taken after the stage of Section 13(4), and therefore, the same would fall within the ambit of Section 17(1) of the Act. Thus, the Act itself contemplates an efficacious remedy for the borrower or any person affected by an action u/s 13(4) of the Act, by providing for an appeal before the DRT.

23. In our opinion, therefore, the High Court rightly dismissed the petition on the ground that an efficacious remedy was available to the Appellants u/s 17 of the Act. It is well settled that ordinarily relief under Articles 226/227 of the Constitution of India is not available if an efficacious alternative remedy is available to any aggrieved person. (See Sadhana Lodh v. National Insurance Co. Ltd., Surya Dev Rai v. Ram Chander Rai and SBI v. Allied Chemical Laboratories.)

24. In City and Industrial Development Corpn. v. Dosu Aardeshir Bhiwandiwala this Court had observed that:

30. The Court while exercising its jurisdiction under Article 226 is duty-bound to consider whether:

(a) adjudication of the writ petition involves any complex and disputed questions of facts and whether they can be satisfactorily resolved;

(b) the petition reveals all material facts;

(c) the Petitioner has any alternative or effective remedy for the resolution of the dispute;

(d) the person invoking the jurisdiction is guilty of unexplained delay and laches;
(e) ex facie barred by any laws of limitation;

(f) grant of relief is against public policy or barred by any valid law; and host of other factors.

25. In the instant case, apart from the fact that admittedly certain disputed questions of fact viz. non-receipt of notice u/s 13(2) of the Act, non-communication of the order of the Chief Judicial Magistrate, etc. are involved, an efficacious statutory remedy of appeal u/s 17 of the Act was available to the Appellants, who ultimately availed of the same. Therefore, having regard to the facts obtaining in the case, the High Court was fully justified in declining to exercise its jurisdiction under Articles 226 and 227 of the Constitution.

15. Accordingly, we do not find any merit in the present appeal and the same is

dismissed. It is, however, clarified that the observations made by the learned single Judge and in this order are for the purpose of disposal of the writ petition and the appeal. The authorities under the Act will independently apply their mind without being bound by the observations. There will be no order as to costs.