
(2012) 09 MAD CK 0172
In the Madras High Court
Case No : Writ Petition No. 29923 of 2011

U. Kirubanandam

APPELLANT

Vs

State Bank of India

RESPONDENT

Date of Decision : 12-09-2012

Acts Referred:

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(2), 13(3A), 2(1)(ha), 2(1)(o), 2(g)
Transfer of Property Act, 1882 — Section 69(1)

Citation : (2012) 7 MLJ 666

Hon'ble Judges : V. Ramasubramanian, J;D. Murugesan, J

Bench : Division Bench

Advocate : R. Gowthama Narayanan, for the Appellant; Om Prakash for M/s. Ramalingam and Associates, for the Respondent

Final Decision : Dismissed

Judgement

V. Ramasubramanian, J.—The writ petitioner challenges the notice issued by the Bank u/s 13(2) of the SARFAESI Act, 2002, on the short ground that after having obtained a Certificate of Recovery, in terms of the 1993 Act, the Bank was not entitled to switch over to the SARFAESI mode. We have heard Mr. R. Gowthama Narayanan, learned counsel for the petitioner and Mr. Om Prakash, learned counsel for the respondent-Bank.

2. The petitioner was sanctioned a term loan facility by the respondent-Bank to the tune of Rs. 13 lakhs, in terms of a Letter of Arrangement dated 17.9.2007. After the petitioner committed default and the account was classified as a non-performing asset, the Bank issued a legal notice dated 25.6.2010 and thereafter filed an application in O.A. No. 155 of 2010 on the file of the Debts Recovery Tribunal III, Chennai, praying for the issue of a Recovery Certificate for a sum of Rs. 12,87,903.37 together with interest at the contractual rate with monthly rests.

3. The petitioner remained ex parte before the Tribunal and the Tribunal passed

an order on 23.9.2011, declaring the Bank to be entitled to a Certificate of Recovery. Accordingly, a Recovery Certificate in DRC No. 61 of 2011 was issued on 28.10.2011.

4. In pursuance of the same, the Recovery Officer of the Debts Recovery Tribunal III also issued a demand notice on 1.11.2011, cautioning the petitioner that steps for recovery will be initiated in accordance with Section 25 of the 1993 Act. However, in the meantime, the respondent-Bank issued a notice dated 22.10.2011 u/s 13(2) of the SARFAESI Act, 2002. In response to the notice, the petitioner filed a reply in terms of Section 13(3-A) taking a very curious stand that he never executed any security interest and calling upon the Bank to furnish details as to when the account was classified as a non-performing asset. After sending such a reply, on 7.12.2011, the petitioner filed the above writ petition seeking to quash the notice u/s 13(2) and also to forbear the respondent from proceeding under the SARFAESI Act, 2002.

5. The primary ground on which the learned counsel for the petitioner assails the impugned notice is that after having obtained a Certificate of Recovery in terms of the 1993 Act, the only option open to the Bank was to pursue further action in terms of the 1993 Act itself and that the Bank cannot now fall back upon the provisions of the SARFAESI Act, 2002. Incidentally Mr. R. Gowthama Narayanan, learned counsel for the petitioner also contended, without any pleading to the said effect, that his account had not become a non-performing asset, within the meaning of the SARFAESI Act, 2002 and that therefore, the initiation of the action under the Act was illegal.

6. We shall first deal with the incidental submission made by the learned counsel for the petitioner about the classification of his account as a non-performing asset by the respondent-Bank. The expression "non-performing asset" is defined u/s 2(1)(o) of the SARFAESI Act, 2002 as follows:-

"(o) "non-performing asset" means an asset or account of a borrower, which has been classified by a bank or financial institution as sub-standard, doubtful or loss asset, -

(a) in case such bank or financial institution is administered or regulated by any authority or body established, constituted or appointed by any law for the time being in force, in accordance with the directions or guidelines relating to assets classifications issued by such authority or body;

(b) in any other case, in accordance with the directions or guidelines relating to assets classifications issued by the Reserve Bank.

7. For initiating action u/s 13(2) of the Act, two conditions are required to be satisfied. They are (i) the borrower, who is under a liability to the secured creditor under a security arrangement should have committed default in repayment and (ii) his account in respect of such debt should have been classified by the secured creditor as a non-performing asset. Though the

expression "non performing asset" is defined in Section 2(1)(o), the expression "debt" is not defined in the SARFAESI Act, 2002. However, Section 2(1)(ha) simply says that the expression "debt" shall have the same meaning assigned to it u/s 2(g) of the 1993 Act. Section 2(g) of the 1993 Act, defines a debt as follows:-

(g) "debt" means any liability (inclusive of interest) which is claimed as due from any person by a bank or a financial institution or by a consortium of banks or financial institutions during the course of any business activity undertaken by the bank or the financial institution or the consortium under any law for the time being in force, in cash or otherwise, whether secured or unsecured, or assigned, or whether payable under a decree or order of any Civil Court or any arbitration award or otherwise or under a mortgage and subsisting on, and legally recoverable on, the date of the application.

8. A careful reading of the definition of the expression "debt" shows that it encompasses within itself several things. It includes (i) any liability due from the person in cash or otherwise (ii) irrespective of whether it is secured, unsecured or assigned and (iii) irrespective of whether it is payable under a decree or order of any Civil Court or any arbitration award or otherwise or under a mortgage which is subsisting and legally recoverable on the date of the application. Therefore, it is clear that the definition of the word "debt" in the 1993 Act, includes even an unsecured debt. But SARFAESI Act, 2002 applies only in respect of debts secured by assets. Therefore, despite the fact that Section 2(1)(ha) of the SARFAESI Act, 2002, adopts the meaning of the expression "debt" appearing in Section 2(g) of the 1993 Act, it has no application verbatim. In other words, expressions such as "unsecured" and "on the date of the application" appearing in Section 2(g) of the 1993 Act, are redundant while importing the same definition into Section 2(1)(ha) of the Act.

9. Nevertheless, the other stipulation contained in Section 2(g) of the 1993 Act, viz., that the liability should have arisen (i) either under a decree or order of a Civil Court (ii) or under an arbitration award or (iii) otherwise, would apply to the invocation of the provisions of the SARFAESI Act, 2002. In simple terms, the expression "debt" defined in Section 2(g) of the 1993 Act, covers a liability that can be traced to any of the 4 things viz.,

(i) A decree or order of a Civil Court;

(ii) An Arbitration Award;

(iii) Otherwise or

(iv) A mortgage subsisting on the relevant date.

10. The word "otherwise" appearing in Section 2(g) of the 1993 Act and consequently imported into Section 2(1)(ha) of the SARFAESI Act, 2002, will steer clear any doubt. The expression "otherwise" appearing in the definition of the word "debt" is a complete answer to the subsidiary contention raised by the

learned counsel for the petitioner. A Certificate of Recovery issued by the Debts Recovery Tribunal also creates a liability covered by Section 2(g) of the 1993 Act. This liability is not one payable under a decree or order of a Civil Court. It is not payable under an arbitration award. It comes under the category of any liability payable "otherwise". Hence the contention of the learned counsel for the petitioner that there is no more a debt after the issue of a Certificate of Recovery under the 1993 Act, cannot stand in the teeth of the definition of the word "debt".

11. In Consolidated Construction Consortium Ltd vs. Indian Bank {AIR 2010 Madras 68}, G. Rajasuria, J., pointed out that a decree debt would also come within the meaning of the expression "debt" and that therefore the provisions of SARFAESI Act, 2002, could be invoked for the purpose of recovery of a debt that got crystallised in the Debt Recovery Certificate. The said decision was cited with approval by the Allahabad High Court also in Modern Times Industries and Others Vs. Debts Recovery Appellate Tribunal, Allahabad and Others, . We are entirely in agreement with the view taken by the learned Judge.

12. Similarly, the Kerala High Court also held in E.P. Sreedharan Vs. The Manager Indian Bank and Another, that the expression "debt" would include a decree debt that crystallised in terms of a Recovery Certificate issued by the Tribunal. A similar view was expressed by a Division Bench of the Gujarat High Court in Ijee Injeeta Ltd vs. Junagadh Vibhagiya Nagrik Sahakari Bank Ltd {2006 (129) Comp. Cases 528 (Guj.)}, on the basis of Section 36 of the SARFAESI Act and the definition of the word "financial asset".

13. Coming to the contention of the petitioner regarding the classification of his account as a non performing asset, it may be seen from the definition of the expression contained in Section 2(1)(o), which we have already extracted above, that an account of a borrower would become a non performing asset, if two conditions are satisfied. The first is that the account is classified as substandard, doubtful or loss asset. The second is that such classification is in accordance with the guidelines issued by the Reserve Bank of India. Therefore, Mr. R. Gowthama Narayanan, learned counsel for the petitioner relied upon a Master Circular bearing No. DBOD. No. BP.BC. 12/21.04.048/2011-12 dated 1.7.2011. In the said Master Circular, non performing asset is defined in paragraph 2.1. It reads as follows:-

2.1 Non performing Assets

2.1.1 An asset, including a leased asset, becomes non performing when it ceases to generate income for the Bank.

2.1.2 A non performing asset (NPA) is a loan or an advance where;

i. interest and/or instalment of principal remain overdue for a period of more than 90 days in respect of a term loan.

ii. the account remains "out of order" as indicated at paragraph 2.2 below, in respect of an Overdraft/Cash Credit (OD/CC).

- iii. the bill remains overdue for a period of more than 90 days in the case of bills purchased and discounted.
- iv. the instalment of principal or interest thereon remains overdue for two crop seasons for short duration crops.
- v. the instalment of principal or interest thereon remains overdue for one crop season for long duration crops.
- vi. the amount of liquidity facility remains outstanding for more than 90 days, in respect of a securitisation transaction undertaken in terms of guidelines on securitisation dated February 1, 2006.
- vii. in respect of derivative transactions, the overdue receivables representing positive mark-to-market value of a derivative contract, if these remain unpaid for a period of 90 days from the specified due date for payment.

2.1.3 Banks should, classify an account as NPA only if the interest due and charged during any quarter is not serviced fully within 90 days from the end of the quarter.

14. From the above definition, it is clear that any asset which ceases to generate income for the Bank becomes a non performing asset, subject to the condition that the interest due and charged during any quarter is not serviced fully within 90 days from the end of the quarter. In the case on hand, this condition stands fulfilled.

15. However, the learned counsel for the petitioner relied upon paragraph 4 of the Master Circular which contains detailed guidelines regarding asset classification. As per paragraph 4 of the Master Circular, assets can be classified into (i) substandard assets (ii) doubtful assets and (iii) loss assets. A substandard asset is defined as per paragraph 4.1.1 of the Master Circular to mean an asset which remained a non performing one for a period less than or equal to 12 months. But this definition is further explained in the same paragraph to the effect that the current net worth of the borrower or the current market value of the security charged should not be enough to ensure recovery of the dues to the banks in full. Therefore, on the basis of such a qualifying statement contained in paragraph 4.1.1, the learned counsel for the petitioner contends that there must be a mismatch between the amount due and the value of the security, to enable a Bank to classify an account as non performing asset. To substantiate such a contention, the learned counsel also relied upon certain observations made by the Supreme Court in paragraphs 40, 41 and 47 of its decision in *Transcore vs. Union of India* {2007 (1) MLJ 929 (SC)}. In paragraph 41 of its decision, the Supreme Court indicated that the value of an asset in an inflationary economy is discounted by time factor and that there is an obligation on the part of the borrower to ensure that the value of the security does not depreciate with the passage of time on account of failure to repay the loan. In paragraph 44, the Court spoke about the mismatch between the asset-liability in

the books of the Bank and held that the failure of a borrower to fulfil the obligation to ensure no mismatch would attract the provisions of the SARFAESI Act, 2002. Therefore, in short, the contention of the petitioner is that while the 1993 Act, can be invoked at any time, the SARFAESI Act, can be invoked only if there is a mismatch between asset and liability leading to the classification of the account as a non performing asset.

16. But such a contention strikes at the very root of the object of the 2002 Act. The object of the 2002 Act is to recover the liability from the borrower, fully, effectively and speedily. If the contention of the petitioner is accepted, the Bank should wait for the security asset to deplete in value, leading to a mismatch. Thereafter, they must initiate recovery proceedings so that what is recovered by the Bank will always be less than what a borrower is liable to pay. There can be nothing more disastrous than this. Therefore, the ancillary submission made by the petitioner on the basis of the definition of the expression "non performing asset" in the Master Circular of the RBI and on the basis of the observation in the decision of the Apex court to the mismatch between asset and liability, is wholly unsustainable.

17. Coming to the main contention of the learned counsel for the petitioner, we have already pointed out that the petitioner questions the right of the Bank to proceed under the SARFAESI Act, 2002, after having obtained a Certificate of Recovery under the 1993 Act. The counsel for the petitioner contends that once a Certificate of Recovery is issued under the 1993 Act, it is the Recovery Officer, who is empowered by Section 25 of the 1993 Act, to proceed to recover the amount by any one or more of the modes mentioned in Clauses (a), (b) or (c) of Section 25. The modes of recovery prescribed in these Clauses are (i) attachment and sale of the properties of the defendant (ii) arrest of the defendant and his detention in prison and (iii) appointment of Receiver for the management of the properties.

18. Apart from the 3 modes mentioned in Section 25, the 1993 Act also prescribes several other modes in Section 28. But nevertheless, the 1993 Act, retains intact, the powers of the Presiding Officer of the Tribunal at any time either to withdraw the Certificate in terms of Section 26(2) or to modify the amount specified in the Certificate. Therefore, it is clear that the power of the Recovery Officer to recover the money is subject to the power of the Presiding Officer of the Tribunal to amend the Certificate of Recovery or even cancel it. Similarly the power of the Recovery Officer to take any one of the modes of recovery prescribed in Section 25 or 28, is subject to any payments made by any person, including a garnishee or even the borrower or the guarantor. The issuance of a Certificate of Recovery does not result in obliteration of the mortgage in the property or the destruction of any of the rights that flow out of the mortgage.

19. Moreover, Section 37 of the SARFAESI Act, 2002, makes it clear that the provisions of the Act, are in addition to and not in derogation of the provisions of

the 1993 Act. Section 35 makes it further clear that the provisions of the SARFAESI Act, 2002, shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Therefore, even if there is any provision (actually there is none) in the 1993 Act, which confers an exclusive jurisdiction upon the Recovery Officer to deal with the property and recover the amount indicated in the Certificate of Recovery, that provision cannot take away the right of the Bank to proceed under the SARFAESI Act, 2002, as the provisions of the SARFAESI Act, 2002, will have an overriding effect upon such a provision that confers the exclusive right upon the Recovery Officer (assuming that there is any).

20. The contention that the doctrine of election would apply, has to be stated only to be rejected. In *Transcore*, the Supreme Court went to the extent of upholding the right of the Bank even to initiate parallel proceedings under the SARFAESI Act, 2002, even when an application under the 1993 Act, was pending before the Tribunal. If at all, the doctrine of election can be imagined to have any application, it would have application only to parallel proceedings. If even parallel proceedings are permitted, in terms of *Transcore*, we fail to understand how the doctrine of election could be invoked at the stage of execution.

21. An order passed by the Debts Recovery Tribunal on an application u/s 19 of the 1993 Act, is like a judgment. The Certificate of Recovery issued in terms of the said order, is like a decree. For executing a normal decree of a Civil Court, one has to file an execution application under Order XXI. But the 1993 Act enables the Recovery Officer to take up the Certificate of Recovery, without any formal application and to proceed to recover the amount. Therefore, what is done by the Recovery Officer u/s 25 or 28 of the 1993 Act, is akin to execution proceedings.

22. In contrast, the action initiated by a Bank under the SARFAESI Act, 2002, is similar to an action u/s 69(1) of the Transfer of Property Act. In case of mortgagees other than Banks and Financial Institutions covered by the SARFAESI Act, 2002, the mortgagees may have to exercise a choice. This is in view of the fact that the right u/s 69(1) should be specifically conferred by the Deed of Mortgage itself. But SARFAESI Act, 2002, is a special enactment. The statute confers the right of sale upon the Bank without the intervention of the Court. Therefore, such a statutory right does not get curtailed by the application of the doctrine of election, especially when the remedy under the SARFAESI Act, 2002, is an additional remedy.

23. As a matter of fact, if the amount recovered by the sale of the secured asset under the SARFAESI Act, 2002, is less than the amount for which Certificate of Recovery is issued under the 1993 Act, the Bank could still proceed to recover the shortfall through the Recovery Officer under the 1993 Act. Therefore, the contention that the Bank cannot proceed under the SARFAESI Act, 2002, is totally ill-founded. In view of the above, we see no merits in the writ petition and hence it is dismissed. There will be no order as to costs.