**(2007) 03 GAU CK 0004**

**In the Gauhati High Court**

UCO Bank, Agartala Branch — APPELLANT

Vs

Dipak Debbarma and Others — RESPONDENT

**Date of Decision :** 05-03-2007

**Acts Referred:**
Constitution of India, 1950 — Article 226
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 17

**Citation :** AIR 2007 Guw 96 : (2007) 4 BC 169 : (2007) 137 CompCas 845 : (2007) 3 CompLJ 141 : (2007) 3 GLR 918 : (2007) 2 GLT 515 : (2007) 79 SCL 559

**Hon'ble Judges :** Hrishikesh Roy, J

**Bench :** Single Bench

**Final Decision :** Allowed

## Judgement

Hrishikesh Roy, J.—Heard Mr. S. Dulta, learned Counsel for the applicant-UCO Bank. Also heard Mr. A.K. Bhowmik, learned Sr. Counsel assisted by Mr. S. Ghosh, learned Counsel for the will petitioners-respondents and Mr. Somik Deb, Mr. B. Dutta, learned Counsel for the respondent No. 3-Rose Valley Real Estate & Constructions Ltd.

By filing this miscallaneous application, the applicant UCO Bank has sought vacation of the interim orders dated 15-2-2007 and 21-2-2007 passed in W.P. (C) No. 41 of 2007.

On 15-2-2007, this Court posted the writ petition on 19-2-2007 and directed that the respondents, the applicant herein, shall no! take any further steps on the basis of notification dated 30-12-2006 (Sale Notice).

By order dated 21-2-2007, this Court issued notice returnable after two weeks in the writ petition and ordered that the question of maintainability of the writ petition shall be kept open. This Court also extended the earlier interim order till the returnable date.

 

2. To decide this case, it would be necessary to take note of some relevant facts:

2.1 The writ petitioners and their deceased father secured a loan from the respondent-UCO Bank for construction of a hotel and as the writ petitioners were not able to repay the loan, the UCO Bank issued notice u/s 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 Act (hereinafter referred to as ''the Act'') in respect of the mortgage created in favour of the Bank. By the aforesaid notice, the UCO Bank by exercise of powers u/s 13(2) of the Act directed the writ petitioners-respondents to discharge their financial liabilities within 60 days from the date of notice and indicated the outstanding liabilities of the writ petitioners as Rs. 1,62,62.845.05 as on 31-5-2004. The writ petitioners were also notified that in the event of failure to make the payment as aforesaid, the Bank will exercise the rights given u/s 13(4) of the Act.

2.2 After the receipt of the aforesaid notice, there were attempts by the writ petitioners to come to an understanding with the Bank for providing the borrowers further time to repay the loan. However, the writ petitioners could not adhere to their commitments and consequently on 12-4-2006, the authorized officer of the Bank took possession of the secured asset (plot No. 10680).

Thereafter, the writ petitioners gave undertakings to liquidate their outstanding and handed over 3 cheques for Rs, 15 lakh, Rs, 10 lakh and Rs. 10 lakh respectively and agreed to occupy the secured assets on lien basis. But first of the cheque of Rs. 15 lakh bearing No. 677781 dated 12 5 2006 of Indian Bank, on presentation was dishonoured. Thereafter, the writ petitioners wrote letter dated 11 -7-2006 admitting that there is no fund in the Bank and requested the Bank not to present the other cheques for encashment.

Eventually, the bank took possession of the secured property on 16-9-2006 by exercise of powers u/s 13(4) of the Act (Annexure-8 to the writ petition).

2.3 Thereafter, the Bank issued a sale notification dated 30-12-2006 offering the mortgaged property for sale to the interested purchasers.

The Bank received 3 offers in response to the aforesaid sale notice and the offer of respondent No. 3 was found to be above the reserve price and accordingly, the Bank was proposing to sell the mortgaged property to respondent No. 3.

3. The writ petitioners being purportedly aggrieved by the sale notice issued by the Bank on 30-12-2006 has approached this Court by contending that under the provisions of Section 187 of TLR & LR Act, as the secured property was owned by the writ petitioners who belong to the ST community, the respondent-Bank has no right to sell the property in question for recovery of the loan due, to any person other than a person belonging to the Scheduled Tribe community. It is further contended that the respondent No. 3, the selected purchaser is not a Scheduled Tribe person and accordingly the Bank cannot sell the mortgaged property to respondent No. 3.

 

4. On the basis of the aforesaid writ petition, this Court as has already been indicated, issued returnable notice of motion, keeping open the question of maintainability, of the writ petition and in the interim, restrained the respondent-Bank from taking any further steps on the basis of the sale notice dated 30-12-2006.

Mr. S. Dutta, learned Counsel for the applicant-Bank has argued, inter alia, that as the writ petitioners had statutory remedy by way of appeal under the Act and as they failed to take recourse to the alternative remedy, the writ petition is liable to be dismissed.

It is further argued that the interim orders obtained at the instance of such borrowers who were issued notice as far back as on 25-6-2004 regarding the decision of the Bank to proceed under the provisions of Section 13(4) of the Act, are not maintainable in law.

Mr. Dutta also contended that neither at the stage of taking over possession of the property i.e. 16-9-2006 nor at the stage of issuing of sale notice on 30-12-2006, the writ petitioners have sought to move the competent Court challenging the action of the respondent-Bank and on this ground alone, the writ petition is not liable to be entertained.

In support of his contentions, Mr. Dutta has drawn the attention of this Court to the decision reported in Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc., and also a Division Bench decision reported in AIR 2006 (NOC) 1547 (Guj) Hemant Automobiles v. Union Bank of India.

5. The Supreme Court in Mardia Chemicals Ltd. (supra) has held that where a secured creditor has taken action under the provisions of Section 13(4) of the Act, in such cases it would be open to the borrowers to file appeals u/s 17 of the Act. In the decision of Hemant Automobiles (supra), a Division Bench of Gujarat High Court held that a writ petition against the Bank''s notice for payment and possession under the Act is not maintainable, in view of the remedy of the appeal under the provisions of the Act.

6. Mr. Bhowmik, learned Sr. Counsel for the writ petitioners has argued that the borrowers in the instant case were served with notice dated 25-6-2004 u/s 13(4) of the Act even before the hotel could commence its business which started on 24-1-2005 and as such the respondent-Bank should have been slow in resorting to the provisions of the Act against the borrowers.

It is further argued that the borrowers were willing to liquidate the loan amount and the opportunity to pay the loan amount within a reasonable time had been denied by the Bank. The borrowers by their undertaking (Annexure-5 to the writ petition) had committed to repay the Bank loan by 31-3-2007 and before waiting for expiry of the said period, the respondent-bank decided to put up the secured property for sale. This, according to the contention raised by the learned Counsel for the writ petitioners, was not warranted in the facts of the instant case.

 

7. Mr. Somik Deb, learned Counsel for the respondent No. 3 Rose Valley Real Estate and Constructions Ltd. has drawn attention to the counter-affidavit filed by him in the instant case. In the said counter-affidavit, it is contended on behalf of the respondent No. 3 that the respondent-bank is under a legal duty and obligation to refund the amount of Rs. 60.75 lakhs deposited by the respondent No. 3 with accumulated interest thereon, which amount was tendered by the respondent No. 3 being the highest offerer, in response to the sale notice dated 30-12-2006. It is further contended that the respondent No. 3 which deals with public money has reached a comprehensive decision to disassociate itself from the purchase process emanating from the notification dated 30-12-2006 because of developments which have taken place since then and accordingly, the respondent No. 3 has declared that it is no more interested to go ahead with the purchase of the mortgaged property.

8. I have considered the arguments advanced by the learned Counsel representing the parties. In the instant case, the writ petitioners/borrowers have raised the plea that the Bank did not give them adequate opportunity to repay the loan and did not wait till the end of March, 2007 and decided to go for sale of the property. It is further contended that the Bank could not have offered the property for open sale and should have confined the invitation of offers, only from Scheduled Tribe persons in terms of the provisions of Section 187 of TLR & LR Act.

9. In the instant case, this Court finds that the respondent-Bank had indicated by its notice dated 26-5-2004 the Bank''s decision to invoke the provisions of Section 13(4) of the Act in respect of the property mortgaged to the Bank. The Bank had thereafter taken possession of the mortgaged property as far back as on 16-9-2006. Only thereafter, the Bank had issued the sale notice dated 30-12-2006. At each of the aforesaid stage, the borrowers were at liberty to avail of the right of appeal provided u/s 17 of the Act. But they failed to avail of the said statutory remedy. The writ petitioners also failed to repay the loan and in fact their cheque was also dishonoured.

The writ petitioners also failed to challenge the sale notice immediately after the same was notified as the challenge to the sale notice is on the ground that offers could be submitted by all categories of persons and the sale was not confined only to Scheduled Tribe category of persons. If that was the reason for the objection of the writ petitioners, they could have immediately made a challenge to the aforesaid sale notice dated 30-12-2006. But they did not move a competent Court with reasonable haste and waited till the sale was actually made and the respondent No. 3 was chosen as the intending purchaser with the highest price offer.

10. Having regard to the aforesaid factual situation, this Court is of the view that the writ petition at the instance of such borrowers, who had remedies available under the Act should not be entertained by this Court in exercise of powers under Article 226 of the Constitution of India. It is further considered that the

 

writ petitioners had not pursued their remedies with reasonable diligence and were also late in approaching this Court. At every stage, the writ petitioners had remedy available to them, starting from the time the Bank took action by issuing the notice dated 25-6-2004 and the writ petitioners did not invoke any of the remedies available to them in law during the entire period starting from 25-6-2004.

In view of the above position, this Court is of the view that the writ petition filed is not liable to be entertained. Consequently, this C.M. Application is allowed vacating the stay orders dated 15-2-2007 and 21-2-2007 passed in W.P. (C) No. 41 of 2007.

 